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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOE G. GARCIA, *et al.*,
Petitioners,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Where Congress has by statute established standards for determining whether reliance on previously-established law shall provide a defense to a class of claims, may a court disregard that statute and adjudicate that defense under the judge-made standards of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971)?

2. Did the Court of Appeals manifestly and seriously misapply the standards of *Chevron Oil*?

3. Where this Court has overruled a prior precedent, may a lower court determine that the overruling decision is to be applied only prospectively and yet refuse to adjudicate the merits of the case on the basis of the old rule?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 838 F.2d 1411, and is reproduced at pp. 1a-20a of the Appendix, *infra* ("A. "). The opinion of the District Court is not reported, and is reproduced at A. 22a-26a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1988. A. 21a. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337. On May 25, 1988, Justice White extended the time for filing this petition to and until July 7, 1988. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves §§ 7(a)(1) and 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 *et seq.* ("FLSA"), and § 10 of the

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 251 *et seq.* ("Portal Act"). This case also involves 29 C.F.R. §§ 775.2-775.4. These provisions are reproduced at A. 27a-32a.

STATEMENT OF THE CASE

A. The *National League of Cities* Decision and DOL's Implementing Regulations

On June 24, 1976, this Court decided *National League of Cities* v. *Usery*, 426 U.S. 833 ("*National League*"). The Court there held, overruling *Maryland* v. *Wirtz*, 392 U.S. 183, that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the FLSA "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852. Under this standard, some, but not all, governmental operations were constitutionally immune from the FLSA.[1]

The uncertainty thereby created greatly troubled the district court to which the *National League* case was returned, and that court, with the cooperation of the Department of Labor, developed a solution which is of considerable importance to the issues now before this Court. These events were described by the Solicitor General in a brief in this Court:

> On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*,

[1] The Court identified several operations which were immune under this test (*id.* at 851 and n.16) and one (carriage by rail in interstate commerce) which was not (*id.* at 854, n.18).

429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the court concluded that "[i]t may be appropriate to provide some protection to the state and local governments" (429 F.Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his statement of FLSA enforcement policy, 29 C.F.R. Pt. 775, so as to provide for listing of government activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall*, 429 F.Supp. at 706) and was published as an interpretative rule. See 29 C.F.R. 775.2(b) and (d) and 775.3(b).[2]

The new 29 C.F.R. § 775.2(b) provided in presently pertinent part that the Secretary

> will not file suit to enforce the minimum wage and overtime compensation provisions of the FLSA against a State or its political subdivision unless at least 30 days notice has first been given that, in the opinion of the [Wage and Hour] Administrator, the activities in question are not integral operations in areas of traditional governmental functions. Such notice will be provided either by specific notification of the employing body in question or by general notification by publication in the Federal Register in the form of amendments to Section 775.3.

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[2] Brief for the Secretary of Labor, Nos. 82-1913 and 82-1951 at 6 (emphasis added).

In 1979, such notice was given to Respondent SAMTA and public operators of local mass transit systems generally, as we describe below.

B. *Garcia I* and the Present Litigation

1. *Initiation of SAMTA's Declaratory Judgment Suit and of the Present Case*

Respondent San Antonio Metropolitan Transit Authority ("SAMTA") is a regional transit authority created pursuant to Texas law to serve the San Antonio metropolitan area. The Wage and Hour Division, acting in response to a specific inquiry about the applicability of the FLSA to employees of SAMTA, rendered an opinion "that the operations of the San Antonio Transit System are not constitutionally immune from the application of the Fair Labor Standards Act." (Opinion WII-499, dated September 17, 1979, reprinted in Wage Hour Manual (BNA) 91: 1138-1140.) That opinion was confirmed on December 21, 1979, when the Wage and Hour Division's enforcement policy was amended to include local mass transit systems in the category of government activities not integral to a traditional governmental function and hence subject to the FLSA. See 29 C.F.R. § 775.3(b)(3).

On November 21, 1979, SAMTA filed an action for a declaratory judgment against the Secretary of Labor seeking a determination that SAMTA is exempt from the provisions of the FLSA. That action ultimately came to this Court and was decided *sub nom. Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (hereinafter *"Garcia I"*). On that same date, petitioners Joe G. Garcia and his fellow employees instituted an action in the district court against SAMTA for overtime pay and liquidated damages under § 16(b) of the FLSA. That action—which is the present case—was stayed pending disposition of SAMTA's declaratory

judgment action, in which Garcia was permitted leave to intervene as a defendant.

2. *The Proceedings in* Garcia I

In November 1981, the district court (Shannon, J.) denied the Secretary of Labor's motion for partial summary judgment and entered judgment for SAMTA. That court's judgment stated that local, publicly operated mass transit systems such as SAMTA "constitute integral operations in areas of traditional governmental functions" for purposes of applying the rule of *National League*. The Secretary and Garcia appealed to this Court, which vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *Transportation Union* v. *Long Island R. Co.*, 455 U.S. 678 (1982). *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

On remand, Judge Shannon reaffirmed his prior conclusion,[3] and the Secretary and Garcia returned to this Court. Both urged, in accordance with DOL's 1979 interpretive rule, that under the standard established in *National League* a publicly owned and operated mass transit system is subject to regulation under the FLSA; the case was argued on this issue at the 1983 Term. At the close of that term this Court, *sua sponte*, set the case for reargument and directed the parties to brief additionally the question: "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), should be reconsidered?" 468 U.S. 1213 (1984).

On February 19, 1985, this Court decided *Garcia I* by overruling *National League* and holding that Congress may constitutionally apply the FLSA to all state and

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[3] *San Antonio Met. Transit Authority* v. *Donovan*, 557 F.Supp. 445 (W.D. Tex., 1983).

local government employees. The judgment of the district court was reversed, and the cases were remanded to that court for further proceedings consistent with this Court's opinion. See 469 U.S. at 557.

3. *The Subsequent Proceedings in This Case*

On the remand to the district court, the parties agreed to dismiss *Garcia I* and to litigate all liability issues in this FLSA § 16(b) action, *Garcia II*, which, as noted earlier, had been stayed during litigation of *Garcia I*. On cross-motions for summary judgment, the district court dismissed the complaint. Judge Prado concluded that *Garcia I* should not be applied retroactively to govern this case; then, applying the standard of *National League*, he adopted Judge Shannon's position that "plaintiffs performed a traditional government function and were therefore exempt from federal overtime requirements before the *Garcia* ruling." A. 26a.

The Court of Appeals affirmed. That court concluded that the retroactivity of *Garcia I* was to be determined according to the tests stated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97; in so ruling, the court rejected petitioners' contention that the common law standards of *Chevron* do not govern a case like the present because in the Portal Act Congress itself has established standards for determining when reliance on existing law is to be a defense. A. 7a-10a; see Point I, *infra*. Applying the *Chevron* factors, the Court of Appeals decided that *Garcia I* does not govern in this case; it rejected petitioners' submission that if *Chevron* is applicable, the employees are entitled to recover for the reason, among others, that there was no decision of this or any other court on which SAMTA could rely for the proposition that mass transit is a "traditional governmental function" and thus immune from FLSA regulation under *National League*. A. 12a-20; see Point II, *infra*.

Thereupon, the Court of Appeals affirmed the judgment in defendant SAMTA's favor. In so doing, the Court of Appeals did not consider whether the petitioners are entitled to recover under the rule which preceded *Garcia I*. Petitioners were thereby denied the right to have their claims adjudicated under the constitutional standards of either *Garcia I* or *National League*. See Point III, *infra*.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision herein marks the latest development in two connected cases, the first of which has twice previously been before this Court. Petitioners now return to this Court because the decision below is patently wrong in its approach to important and recurring questions concerning the "reliance-on-previously-settled-law" defense; is wholly unfaithful to the Court of Appeals' obligation to defer to Congress' legislative directions; and is both perversely paradoxical and utterly unjust in its result.

In both *Garcia I*[4] and in this case the SAMTA employees argued that publicly-owned local mass transit is plainly covered by the FLSA and is *not* a "traditional governmental function" immune from federal regulation under this Court's *National League of Cities* decision.[5] In *Garcia I*, after first reversing and remanding a district court decision favorable to SAMTA, this Court ruled that the FLSA does, and constitutionally may, cover local mass transit operations. The Court, however, did so, not by further elucidating the *National League of Cities* test but by raising *sua sponte* the question of whether that test should be overruled and then by answering that question in the affirmative.

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[4] *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528.

[5] *National League of Cities* v. *Usery*, 426 U.S. 833.

Thus, *Garcia I* ended in a decision *wholly favorable to the SAMTA employees.* But, according to the Court of Appeals, all of that is *as nothing* and the result is that the employees do not receive a penny in lost overtime pay and are even refused a determination on the merits of their claim under either the *National League* standard—which prevailed when they brought this suit—or the new *Garcia I* precedent. That is the result according to the Court of Appeals notwithstanding

- the fact that at the time the litigation began, SAMTA was faced with the Wage and Hour Administrator's decision supporting FLSA coverage;
- the further fact that at that time, SAMTA could not point to any legal authority for its position that publicly-owned local mass transit was not covered by the FLSA;
- the further fact that there is no doubt that if *Garcia I* had been decided in the employees' favor by applying *National League of Cities* rather than by overruling that decision, the lost overtime pay would be due and owing; and
- the further fact that the three circuits which confronted the question prior to this Court's *Garcia I* decision ruled that under *National League of Cities* publicly-owned local mass transit operations were covered by the FLSA.

The decision below is thus a cruel travesty of equal justice under law rather than its embodiment, and obviously cannot be permitted to stand. Not surprisingly, that decision is not simply an affront to common sense and the needs of a soundly functioning litigation system; it is also shot through with legal error on significant and recurring legal questions.

As we show in Part I below, the Court of Appeals decided the case on its own views of the proper common-law rule regarding reliance on previously settled legal rules rather than, as is its duty, by deferring to *Congress'*

determination in the Portal Act on the exact question of when employers are entitled to such a defense in a suit under the FLSA. And, as we show in Part II, the Court of Appeals grossly misapplied and misunderstood this Court's seminal decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, taken on its own terms. Finally, as we show in Part III, the Court of Appeals' decision of the case in SAMTA's favor without adjudicating the merits of petitioners' claims under the constitutional standards of *either Garcia I or National League* is clearly wrong and contrary to decisions of the Third and Eleventh Circuits.

I.

In following the judge-made standards of *Chevron Oil Co.* v. *Huson, supra*, rather than those which Congress has provided as FLSA claims in the Portal Act, the decision below squarely conflicts with the decisions of this Court, most notably *Milwaukee* v. *Illinois*, 451 U.S. 304, which have established the limits on the federal courts' authority to apply common law principles. The error is so fundamental—and the misapplication of *Chevron* beyond its intended scope of such widespread significance—as to warrant review by this Court.

A. In the Portal Act, Congress expressly detailed the circumstances under which employers are to be relieved from liability for violations of the FLSA where a judicial decision has upset their expectation that their conduct was lawful. Finding that the FLSA "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation" (Portal Act § 1(a)), Congress wiped out a vast number of pre-existing claims. Congress went on to enact in § 10a, a carefully balanced—and tightly limited—exemption from liability for the failure to pay FLSA minimum wages or overtime compensation where the employer

> pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.[6]

Congress thereby established the conditions under which a change in the law would be a defense in a suit under § 16(b) of the FLSA for acts or omissions after the effective date of the Portal Act.

The DOL enforcement policy which was published in response to the *National League* decision (see pp. 2-3, *supra*) meshed with Portal Act § 10. That policy provided a defense to SAMTA and other mass transit employers in accordance with § 10 against post-*National League* claims under the FLSA *during the period in which such employer could, in fact, rely thereon as provided in 29 C.F.R. § 775.2(b).* SAMTA itself expressly invoked § 10 in the court below in order to bar liability "[b]etween the date of the Supreme Court's decision in *National League* and the [DOL] 1979 transit determination", pointing to an affidavit that SAMTA relied on DOL's policy or practice in this regard in not conforming its pay practices to the FLSA.[7] But once an em-

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[6] So too, "as part of its response to this Court's expansive reading of the FLSA, Congress enacted the 2-year statute [of limitations] to place a limit on employers' exposure to unanticipated contingent liabilities." *McLaughlin* v. *Richland Shoe Co.*, —— U.S. ——, 108 S.Ct. 1677, 1680 (May 16, 1988), footnote omitted. See also, *e.g.*, § 11 of the Portal Act, which provides that the court may, in its sound discretion, reduce or eliminate an award of liquidated damages under § 16 of the FLSA "if the employer shows to the satisfaction of the court that the act or omission was not a violation of the [FLSA]."

[7] Brief of Defendant-Appellee in the court below at 57-58. Since SAMTA did not comply with § 7 of the FLSA with respect to its

ployer was specifically notified that in the Administrator's opinion local mass transportation systems are *not* integral operations in an area of traditional governmental functions (see p. 4, *supra*) (or, absent such notification, when 29 C.F.R. § 775.3 was amended to so declare) the Portal Act disallowed the defense.

B. Since Congress has legislated on the subject, the courts are not free to substitute their own views as to when reliance on prior law should provide a defense to a suit under the FLSA. *Milwaukee* v. *Illinois*, *supra*, carefully explains why this must be so, given the respective functions of Congress and the courts:

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. (Citations omitted.) The enactment of a federal rule in an area of national concern * * * is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. [451 U.S. at 312-313.]

While acknowledging that "the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law" (451 U.S. at 313, citations omitted), the Court made clear the limits and an extraordinary character of this function:

> Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the

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employees' overtime even after being notified of DOL's new enforcement policy, there is a question as to whether its previous omission in this regard was "in good faith in conformity with and in reliance on" the earlier enforcement policy; that is a question which should have been decided by the district court in accordance with Portal Act standards.

> Congress and the federal judiciary are inapplicable. We have always recognized that federal common law is "subject to the paramount authority of Congress." * * * It is resorted to "[i]n absence of an applicable Act of Congress," * * * and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone." * * * Federal common law is a "necessary expedient," * * * and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears. * * * [F]ederal common law applies "[u]ntil the field has been made the subject of comprehensive legislation or authorized administrative standards" * * *. [451 U.S. at 313-314, citations omitted.] [8]

This principle governs this case. The Court of Appeals' attempts to evade it are manifestly inadequate. That court declared it to be a "problem with Garcia's argument," that "there is little support for the proposition that *Chevron Oil Co.* v. *Huson, supra*, as a doctrine of federal common law, can *never* apply when a judicial decision changes the reach of a congressional statute." A. 7a-8a, emphasis added. No such broad proposition was advanced. Our position was and remains simply that *Chevron* is inapplicable where Congress has legislated a rule determining whether a defense is available for reliance on prior law, and that in the Portal Act Congress has so legislated with respect to claims brought under the FLSA.[9] The cases cited below, wherein an Establishment

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[8] See also, *e.g., Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95, n.34: "Thus, once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law."

[9] By its terms, § 10 of the Portal Act also governs claims for minimum wages or overtime compensation under the Walsh-Healey Act, 41 U.S.C. §§ 35 *et seq.*, and the Bacon-Davis Act, 40 U.S.C.

Clause ruling [10] and interpretations of Title VII of the 1964 Civil Rights Act affecting pension plans [11] were declared to be nonretroactive, are simply irrelevant because neither the Constitution nor any statute declares a rule respecting the retroactivity of decisions in these contexts.[12]

The court below said also that "[e]ven if *Chevron* is a doctrine of federal common law there is no statute that sets a Congressional policy on retroactivity contrary to *Chevron*." Yet that court did not even mention § 10 of the Portal Act, on which petitioners had predicated their argument (see A. 7a), let alone demonstrate that § 10 does not "address the problem of retroactivity." *Id.* The court could not have done so. Indeed, SAMTA urged that "§ 10 of the Portal-to-Portal Act bars any liability prior to the Department of Labor's 1979 transit determination." See p. 10, *supra*.

There is likewise no merit to the further objection that our position

> would never allow a decision holding a new rule of constitutional or statutory interpretation nonretroactive. The new rule, as the definitive expression of the meaning of either the Constitution or a statute, would naturally override any common law principles favoring nonretroactivity. [A. 9a.]

This criticism is fallacious. The court below simply failed to differentiate between the content of "the new

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§§ 276a *et seq.* Section 10 of the Portal Act is also applicable to claims under the Age Discrimination in Employment Act by § 7(e) of the ADEA, 29 U.S.C. § 626(e)(1).

[10] *Lemon* v. *Kurtzman*, 411 U.S. 192.

[11] *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, and *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702.

[12] *Chevron* itself involved the retroactivity of a decision affecting a claim under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. §§ 1331 *et seq.* That statute does not speak to the question of retroactivity.

rule"—that is, the new constitutional principle or statutory interpretation whose retroactivity is at issue—and the standards for determining whether or not that rule should apply retroactively. The latter issue is one which Congress has addressed in some statutory contexts, such as suits under the FLSA (and other statutes encompassed directly or indirectly by § 10 of the Portal Act; see pp. 12-13, n.9, *supra*), and elsewhere, as in the Internal Revenue Code, 26 U.S.C. § 7805(b), and (with regard to credit transactions) in the Truth in Lending Act, 15 U.S.C. § 640(f). In other statutory contexts, Congress has been silent, leaving the courts free—by necessity—to establish their own standards, but only until Congress chooses to legislate on the subject. The Court of Appeals' approach renders nugatory such Congressional judgments by insisting that the *Chevron* common law standards apply notwithstanding what Congress has done.[13]

II.

In concluding that SAMTA's failure to comply with the FLSA is not actionable, the Court of Appeals seriously misapplied each of the three *Chevron* factors. As we shall show, that court's reasoning expands *Chevron's* nonretroactivity doctrine beyond the limits recognized in any prior cases, misstates the purpose of the rule in *National League of Cities* and disregards statutory policy.

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[13] The court below quoted *United States* v. *Johnson*, 457 U.S. 537, 563, for the proposition that " 'all questions of civil retroactivity [are] governed by the standard enunciated in *Chevron Oil*' * * * whether they concern statutes, the common law, or even the Constitution." A. 10a. But the broad language of *Johnson* does not justify the Court of Appeals' ruling since no decision of this Court has applied judicially-created retroactivity standards in the face of a statute which declares when reliance on existing law may be asserted as a defense. Cf. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.")

A. While recognizing that justified reliance on prior law is the essence of the first *Chevron* factor, the court below established a novel standard for measuring such reliance which is so loose as to vitiate "the usual rule • • • that federal cases should be decided in accordance with the law existing at the time of decision." *Goodman* v. *Lukens Steel Co.*, 107 S.Ct. 2617, 2621 (June 19, 1987).

The key to analysis of the reliance issue under the first *Chevron* factor is that SAMTA's claim of constitutional immunity depended not on one but on two propositions: (1) A local governmental body is immune from the FLSA with respect to its operation of any "traditional governmental function," and (2) the operation of a mass transit system is a "traditional governmental function." SAMTA was entitled to rely on the first of these propositions, which was established in *National League* until that decision was overruled in *Garcia I*. However, the second of these propositions had not been established by this Court, or even suggested in *dictum*, in any case. There was, in fact, no decision of any court so much as suggesting that mass transit is constitutionally immune from the FLSA. Indeed, SAMTA knew, at least from the time the Transit Authority received the DOL opinion which prompted SAMTA's declaratory judgment suit, that the status of mass transit as a "traditional governmental function" was an unsettled question of law, like countless others.

Nevertheless, the court below concluded that SAMTA satisfied the first *Chevron* factor. As that court framed the issue, "whether SAMTA was entitled to rely on *National League of Cities* in failing to follow the FLSA depends upon whether public mass transit is a traditional state function or a nontraditional one" (A. 14a); but the court then concluded that it is "impossible for us to make such a determination one way or the other • • • because the Supreme Court has explained that the *Na-*

tional League of Cities doctrine was 'unsound in principle and unworkable in practice.'" (A. 15a, quoting 469 U.S. at 546.)

This perceived dilemma was solely of the Court of Appeals' own making. That court incorrectly propounded an *ex post facto* inquiry into what the ultimate outcome would have been if this Court had applied *National League* standards to mass transit functions. Given that *National League* had determined that only "traditional governmental functions" qualified for immunity, the real issue was whether, *at the time SAMTA acted*, there was any decision on which the Transit Authority was entitled to rely for the proposition that mass transit operations were such a function.

Having posed the wrong question, and finding that *Garcia I* foreclosed an answer thereto, the court below continued:

> We believe, however, that the equitable nature of the *Chevron* test gives it enough flexibility to allow us to reach a conclusion as to whether [*Garcia I*] should be applied retroactively. [A. 15a.]

That court answered this question in SAMTA's favor by positing a series of "right[s]" which it believed SAMTA enjoyed:

> SAMTA was relying on the general framework provided by *National League of Cities*, as it undoubtedly had a right to do. SAMTA also had a right to pursue its claim that it was exempt from the FLSA through the courts, and to the Supreme Court if necessary, to obtain a final resolution. Once it had obtained a district court decision in its favor, SAMTA definitely had a right to rely on that decision unless it was overturned. [A. 15a-16a.]

We unhesitatingly agree that SAMTA had a "right" to litigate the question whether "it was exempt from the FLSA through the courts * * *." But nothing in *Chevron*

or any other case gave SAMTA the "right" not to pay overtime and to litigate on the basis that the Transit Authority would be relieved of liability *even if it should ultimately be determined that SAMTA was not immune.* No "reliance" doctrine can sanction such a "heads I win, tails you lose" posture.

Nor does *Chevron* declare a "right" to "rely[] on the general framework" of a precedent. Because constitutional doctrines almost invariably provide a "framework" for deciding related questions, the radiations of any overruling decision provide a plausible argument by countless parties that they would have prevailed under the original precedent even though the outcome was so uncertain under the old precedent that reliance thereon was unwarranted. And, of course, nothing in *Chevron* would justify reliance by SAMTA, first on its own views as to whether mass transit is a traditional governmental function, and thereafter on the decision of the district court in its own case during the appeal thereof and even after that decision had been vacated by this Court on the basis of the *Transportation Union* case (see p. 5, *supra*).[14]

In sum, the *Chevron* test does not and should not have "enough flexibility" to accommodate the Court of Appeals' approach, which expands nonretroactivity doctrine far beyond the point where principled application is possible, and trivializes the requirement for justifiable reliance which underlies *Chevron's* "equitable nature".

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[14] The court below wholly disregarded the period between the commencement of SAMTA's declaratory judgment suit and the first district court decision, and between the time that decision was vacated by this Court and the district court's reaffirmation of its original views. On what did SAMTA then rely? The court also failed to consider whether reliance on a district court's decision was justifiable—let alone prudent, in terms of budgetary planning, see A. 19a-20a, discussing the equities—in the face of consecutive rulings by three Circuits that mass transit is not a "traditional governmental function." See cases cited 469 U.S. 530, n.1.

B.(1). The Court of Appeals determined that the second prong of the *Chevron* test, whether "retrospective operation will further or retard [the] operation" of the new rule (see 404 U.S. at 107), is "neutral" (A. 16a). That conclusion was based on characterizing *Garcia I*'s purpose as "compelling future FLSA compliance" by state and local governments. This characterization of *Garcia I* is far too narrow. The core holding of *Garcia I* is that the Commerce Clause empowers Congress to subject states and their political subdivisions to regulation under the FLSA. Operation of that rule is unquestionably "retard[ed]" by a decision which denies relief for past violations of the FLSA. This Court has made it plain that making employees whole by vindicating claims for minimum wages or overtime premiums which were withheld in violation of the FLSA, is a major element of Congressional policy. See *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 739-741, and cases cited *id.*[15]

We recognize that two other circuits have likewise concluded that the second *Chevron* factor is neutral with respect to the retroactive application of *Garcia I*.[16] But we submit that Judge Becker's dissent from that view captured the essence of the matter:

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[15] Congress decisively manifested its concern that FLSA violations should not go unremedied after this Court held, in *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973), that the private remedy in § 16(b) is not available against states and local governments. First, Congress amended § 16(b) by specifying that such suits may be "maintained against any employer (including a public agency), in any Federal or State Court"; and second, it added § 6(d) to the Portal Act, suspending the statute of limitations, "in order to preserve existing actions * * * which would otherwise be barred by the statute of limitations as a result of the [*Missouri*] decision." See House Rpt. No. 93-913, [1974] U.S. Code Cong. and Adm. News 2811 at 2850.

[16] *Mineo* v. *Port Authority of New York and New Jersey*, 779 F.2d 939, 945 (C.A. 3); *Ackinclose* v. *Palm Beach County, Fla.*, 845 F.2d 931, 935 (C.A. 11).

> Moreover, this court's continued recognition of exemptions in the coverage of the FLSA that were created solely by the judicial branch and have since been invalidated would constitute an unjustifiable intrusion into the legislative branch's authority and an unwarranted divergence from congressional intent.[17]

(2). As Judge Becker also said with respect to the second *Chevron* factor:

> I believe that non-retroactive application of *Garcia* results in the unseemly spectacle of the court's deciding this case under a pre-existing analytical framework that the Supreme Court has found to be unsound in principle and unworkable in practice. *Garcia*, 105 S.Ct. 1016. Thus, in Part IV of its opinion the majority is forced to apply an analysis that the Supreme Court has denigrated as "not faithful to the role of federalism in a democratic society" and "disserve[ing] principles of democratic self-governance." *Id.* at 1015, 1016. [779 F.2d at 954, footnote omitted.]

As we have seen, the court below, too, understood that repudiation of the "traditional governmental function" test in determining the "limits on the Federal Government's power to interfere with state functions" (469 U.S. at 547) was a principal objective of the decision to overrule *National League*. Yet that court below inexplicably failed to grasp what Judge Becker so lucidly stated: *viz.*, that it would defeat the purpose of this rule to apply *Garcia I* only prospectively and decide pending cases under the *National League* standard.[18]

C. The Court of Appeals determined that the third *Chevron* factor—a balancing of the equities of parties—favored nonretroactivity for "two basic reasons". A. 19a.

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[17] *Mineo, supra*, 779 F.2d at 954 (dissenting opinion).

[18] The alternative silently adopted by the court below—to dismiss the petitioners' claims without applying the rule of either *National League* or *Garcia I*—is wholly unprincipled and must be rejected for the reasons stated in point III hereof, pp. 22-24, *infra*.

The Court of Appeals' first reason depends on its assertion that SAMTA justifiably acted and planned its budget [19] on the assumption that the transit authority was not required to comply with the FLSA. But SAMTA did not "suddenly find[] out that contrary to precedent of the Supreme Court" (A. 19a) SAMTA was subject to regulation under the FLSA; there *never was* a precedent which established that *SAMTA* was immune. Nor was SAMTA justified in relying—if it actually did rely, rather than merely take its chances—on the "decisions of the district court" (*id.*) in this case. We shall not reiterate our discussion at pp. 16-17, *supra*, on this point, but in considering the equitable component of the *Chevron* test, one additional observation is appropriate:

If Garcia and the Secretary of Labor had prevailed in SAMTA's declaratory judgment suit on the ground that mass transit is not a traditional governmental function, the suggestion would not have been seriously entertained that it is inequitable for the employees to recover in this companion suit for back pay. The respective equities of the parties are not affected one iota by the circumstance that this Court reached the same result by overruling *National League*. Since the outcome was *not* "contrary to precedent of the Supreme Court", there simply was no justifiable reliance which could create equities in SAMTA's favor.

The Court of Appeals' second reason for resolving the equities against SAMTA's employees was "that what SAMTA employees have not received in overtime compensation over the past several years, they have received *at least partially* in other forms."[20] A. 20a, emphasis

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[19] The lower courts' dire predictions as to the potential adverse impact which a decision in petitioners' favor would have on SAMTA's budget is unsupported by any findings as to either SAMTA's potential liability or its relationship to SAMTA's total budget.

[20] Of course, SAMTA's back-pay liability would be reduced to the extent that its employees have already received overtime pay

added. In this respect, the court pointed (a) to negotiations between SAMTA and the employees' union representative (A. 18a); and (b) to its view that "SAMTA must compete for labor in the marketplace against employers who are subject to the FLSA, and so it could not simply subtract the benefits required by the FLSA from its own programs." A. 20a.

The illegality of public sector collective bargaining in Texas renders illusory the Court of Appeals' notion that there were arms-length negotiations between the parties; and there is nothing in the record about operation of the labor market in the San Antonio area which might warrant a surmise that SAMTA's employees enjoy sufficient job mobility as to require SAMTA to match the benefits paid other employees.[21]

But the major vice of the lower court's speculations is its failure to respect "the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions."[22] For, in balancing the equities between SAMTA and its employ-

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which satisfied the FLSA requirements. The issue here is whether the *employees* must absorb the shortfall.

[21] The court below simply *assumed* that these employees could find appropriate alternate employment, although it appears that for trained bus drivers, SAMTA is the only game in town. More generally, employees who have invested many years on a job must usually sacrifice seniority, accumulated pension credits and other earned emoluments if they obtain other employment.

[22] *Moragne* v. *States Marine Lines*, 398 U.S. 375, 392 (Harlan, J.). See also *id.* at 390:

> Th[e] legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.

ees, the court below rested on its own economic theories and value judgments, notwithstanding that Congress has unmistakably adopted opposite policies.

Whereas the court below relied on SAMTA-union "negotiations," it is well settled that even where wage and hour standards which fail to satisfy FLSA requirements are accepted by employees in an agreement reached by genuine collective bargaining, liability under the FLSA is not excused. See *Barrentine, supra,* 450 U.S. at 740-741, and cases cited *id.*[23] More fundamentally, in enacting the FLSA, the National Labor Relations Act and other major protective legislation, Congress necessarily rejected the theory that labor markets are efficient and provide employees with bargaining power equal to that of employers.

In sum, by disregarding Congressional policies when it balanced the equities the court below compounded the error which it made when it chose to apply *Chevron's* standards rather than those established in the Portal Act: It disrespected the primacy of the Legislature in formulating public policy.

III.

Having concluded that the decision in *Garcia I* should be applied only prospectively, the Court of Appeals did not go on to consider petitioners' alternative contention that their claims should be sustained under pre-*Garcia I* law, that is, under the standards of *National League.*

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[23] When Congress wishes to authorize collectively bargained exceptions to the FLSA's overtime requirements, it does so with specificity. *Barrentine,* 450 U.S. at 741-742, n.19. See also FLSA § 7(o), permitting agreements for compensatory time in lieu of overtime for employees of a public agency. This provision was added by § 2(a) of the Fair Labor Standards Amendments of 1985, 99 Stat. 787.

Rather, that court dismissed those claims without further explanation. That Catch-22 approach demeans the law.

Under the Court of Appeals' decision this Court's affirmation in *Garcia I* that Congress may constitutionally create claims under the FLSA against state employers regardless of the function the employees perform operates not to vindicate the SAMTA employees' claims under the FLSA but to eradicate those claims. While the Court's *Garcia I* holding is given only prospective effect, a portion of its analysis is applied retroactively. Petitioners are deprived of their basic right to persuade the courts that their claims are valid *under some law*—be it that of *National League* or that of *Garcia I*.[24]

Not surprisingly, the two other courts of appeals which have held that *Garcia I* is not retroactive did not automatically dismiss the plaintiffs' claims. As we observed earlier, the Third Circuit in *Mineo* proceeded to decide whether the plaintiffs there were entitled to recover under the *National League* doctrine. More recently, the Eleventh Circuit remanded that question to the district court. *Ackinclose* v. *Palm Beach, Fla.*, 845 F.2d 931 (1988). In so ruling, that court noted and severely criticized the Fifth Circuit's decision herein:

> It is true that *Garcia* prospectively swept away the unworkable traditional governmental function test for FLSA coverage in state and local government. Nevertheless, the Supreme Court's rejection of the troublesome *National League of Cities* standard did not somehow erase the protection the Act afforded individuals working in areas outside of the traditional governmental function sphere prior to the April 15, 1985 mandate in *Garcia*.
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[24] Putting the matter in the Court of Appeals' own terms, if SAMTA was entitled to "rely[] on the general framework provided by *National League*" (A. 15a), why not its employees also?

> If we were to hold that the traditional governmental functions criterion could not be applied on remand, appellants' FLSA claim would effectively be mooted without a determination having been made as to whether they were covered by the Act during the period of time their suit covers. That is an incongruous result we cannot embrace. [845 F.2d at 938, n.6.]

Despite its sharp disagreement with the decision in this case, the Eleventh Circuit said that "we see no direct conflict between the result reached here and the above-cited opinion of the Fifth Circuit." *Id.* But the difference to which the Eleventh Circuit pointed—that the present case arises "on remand in the very case in which [the] new rule [concerning the reach of §§ 6 and 7 of the FLSA] was set down" (*id.*)—is wholly unrelated to the legal issue on which the courts squarely differed: *viz.*, the issue of whether the plaintiffs in the respective cases are entitled to have their claims considered under *National League*, if not under *Garcia I*.[25]

Accordingly, the genuineness of the conflict of decisions in this regard between the Fifth Circuit and the Third and Eleventh Circuits cannot be gainsaid. And putting that point aside, dismissal of the SAMTA employees' claims without adjudicating their merits under either *Garcia I* or under the prior overruled precedent is so inconsistent with the equitable nature of the *Chevron* doctrine, and so contrary to the accepted and ordinary course of judicial proceedings as to call out for review by this Court.

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[25] The court below addressed this circumstance only to reject the submission that petitioners are, for that additional reason, entitled to the benefits of the new rule. [A. 10a-12a.]

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-5526

JOE G. GARCIA, On Behalf of Himself and Others Similarly Situated,
Plaintiffs-Appellants,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Defendant-Appellee.

March 9, 1988

Appeal from the United States District Court
for the Western District of Texas

Before THORNBERRY, POLITZ and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Joe G. Garcia appeals the district court's decision granting the motion of the San Antonio Metropolitan Transit Authority ("SAMTA") for summary judgment and denying his own. For the following reasons, we affirm the judgment of the district court.

I

SAMTA is the governmental body that runs the public transit system in San Antonio, Texas. The plaintiffs (collectively, "Garcia"), employees of SAMTA, brought this action in 1979 for back pay and liquidated damages attributable to SAMTA's violation of the Fair Labor Standards Act ("FLSA"). The historical context for the current appeal is unusually complex.

In 1974, Congress amended the FLSA to repeal the exemption from the minimum wage and overtime provisions for all state and local government employees. In 1976, however, the Supreme Court curtailed the application of the FLSA to state and local governments, holding that principles of federalism prevented Congress under the commerce clause from regulating "integral operations in areas of traditional governmental functions." *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976). The court did not attempt, however, to enumerate all the governmental activities that were exempt from federal regulation. Instead, the Court merely listed "fire prevention, police protection, sanitation, public health, and parks and recreation" as examples of protected functions. The Court did not address the status of government-owned mass transit systems.

After the 1976 decision in *National League of Cities*, SAMTA notified its employees that it would no longer abide by the FLSA's maximum hours and overtime provisions. The Department of Labor, which was charged with the enforcement of the FLSA, made no attempt to enforce the overtime provisions against any public transit system until September 17, 1979, when it informed SAMTA that it did not consider the operation of a public transit system a "traditional governmental function" protected under *National League of Cities*. Shortly afterward, SAMTA filed a declaratory judgment action

against the Secretary of Labor, seeking reversal of the Department's decision. The same day and in the same district court, Garcia brought the case now on appeal, an action for back pay and liquidated damages because of SAMTA's claimed violation of the FLSA.[1]

The district court stayed Garcia's case while the parties litigated *SAMTA I*. In 1981, the district court rendered summary judgment for SAMTA against the Secretary, holding that SAMTA's operation of a public mass transit system was protected from federal regulation under *National League of Cities*. The Supreme Court, however, vacated the judgment and remanded the case for reconsideration in the light of the intervening decision of *UTU v. Long Island Railroad*, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982), which held that a railroad that carries passengers and freight is not protected by *National League of Cities*. In February 1983, however, the district court again ruled for SAMTA, adhering to its view that mass transit was a traditional governmental function and distinguishing *Long Island Railroad*. On appeal, the Supreme Court reversed, overruling *National League of Cities* and holding that Congress could constitutionally apply the FLSA to all state and local government employees. *Garcia v. SAMTA*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). On remand to the district court, the parties agreed to dismiss *SAMTA I* and to litigate *SAMTA II*, which had been stayed during the entire litigation of *SAMTA I*. The dismissal allowed the Secretary of Labor to exit the dispute.

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[1] The district court allowed Garcia, the plaintiff in the second case, to intervene in SAMTA's action against the Secretary. Thus, both cases confusingly bear the name *Garcia v. SAMTA*. For that reason, we call the case that SAMTA brought against the Secretary of Labor *"SAMTA I"* and the case that Garcia brought, *"SAMTA II,* 557 F. Supp. 445."

With *SAMTA I* dismissed by agreement in the district court, both parties moved for summary judgment in Garcia's original action. SAMTA argued that the Supreme Court's decision in *SAMTA I* should not be applied retroactively under the facts of the case; therefore, the court should apply the old *National League of Cities* test to exempt SAMTA from liability. Garcia argued that *SAMTA I* should be applied, and that therefore SAMTA was liable for back pay and liquidated damages because of its violation of the FLSA. The district court granted SAMTA's motion and denied Garcia's.

II

In *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976), the Supreme Court held that "insofar as the challenged [FLSA] amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress" by the commerce clause. As examples of traditional state functions exempt from federal regulation, the Court listed "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* The Court noted, however, that the examples it suggested were "obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* n. 16.

It soon became apparent, however, that courts would have difficulty in applying *National League of Cities* consistently in deciding which state functions were "integral operations in areas of traditional [state] governmental functions." As the Court later noted,

> Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, licensing automobile drivers, operating a municipal

> airport; performing solid waste disposal, and operating a highway authority, are functions *protected* under *National League of Cities.* At the same time, courts have held that issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped, are *not* entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side.

Garcia v. SAMTA, 469 U.S. 528, 105 S.Ct. 1005, 1011, 83 L.Ed.2d 1016 (1985). Based in part on the practical difficulty in applying *National League of Cities*, the court in *SAMTA I* overruled that decision, holding instead that the states were adequately protected against unreasonable federal interference by their substantial role in constituting the federal government. *Id.* 105 S.Ct. at 1016-20. Congress reacted to the overturning of *National League of Cities* by amending the FLSA to eliminate retroactive liability for functions already categorized as "traditional," but did not take a position on retroactivity as to other government functions such as the transportation function presented in this case. Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, 99 Stat. 787 (1985), §§ 2(c), 7. *See also* S.Rep. 159, 99th Cong., 1st Sess. 15 (1985); H.R.Rep. No. 331, 99th Cong., 1st Sess. 27-28 (1985), U.S. Code Cong. & Admin. News 1985, p. 651.

In the present case, the district court refused to apply *SAMTA I* retroactively. Instead, using the analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the court concluded that *SAMTA*

I should be applied prospectively only. *Chevron* identified three factors which courts should consider in deciding whether to recognize an exception to the general rule that the applicable law is that in effect at the time of the decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, . . . by overruling clear past precedent on which litigants may have relied. . . . Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive applications, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. 92 S.Ct. at 355.

In applying the *Chevron* analysis, the district court found that the first factor favored nonretroactivity, because *SAMTA I* had overruled a clear past precedent upon which SAMTA had "reasonably relied." The second factor favored neither, because *SAMTA I* would be fully enforced in the future regardless of the outcome of the decision to apply it retroactively. The third factor strongly favored nonretroactivity, as SAMTA had "structured its conduct based on the reasonable belief that its employees performed a traditional government function. Wage rates and benefit packages were negotiated based on this premise." The complete *Chevron* test therefore led the district court to conclude that *SAMTA I* should not be applied retroactively.

Garcia attacks the district court's decision on three grounds. First, he argues that *Chevron*, which states

a principle of mere federal common law, is inapplicable when Congress has by statute decided to apply the FLSA retroactively and that the FLSA, when read in conjunction with the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq.*, sets forth the only possible defenses to a FLSA violation, and that SAMTA has not fulfilled the requirements of any of these defenses. Second, he argues that *Chevron* is inapplicable because the parties in this case are the same as those in the Supreme Court's *SAMTA I* decision, and *Chevron* cannot operate to deny to the victorious parties in *SAMTA I* the fruits of that victory. Last, he argues that even if *Chevron* is the proper standard, the district court erred in finding that *Chevron* requires nonretroactivity on the facts of this case.

III

A.

Garcia asserts that *Chevron* set forth a doctrine of federal common law concerning retroactivity of civil cases. As a doctrine of federal common law, it naturally must yield when Congress by statute has set a contradictory policy. *See Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 1790, 68 L.Ed.2d 114 (1981). And in the case of the FLSA, Garcia argues, Congress did set a contradictory policy. By its own terms, the FLSA has unquestionably applied to most state and local government employees since 1974, although from 1976 to 1984 *National League of Cities* prevented the full enforcement of the statute. Furthermore, this court has held that the Portal-to-Portal Act, 29 U.S.C. § 259, supplies the only defenses to liability for FLSA violations. *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1262 (5th Cir.1986). SAMTA does not assert any defense based on that act.

A problem with Garcia's argument is that there is little support for the proposition that *Chevron*, as a doc-

trine of federal common law, can never apply when a judicial decision changes the reach of a congressional statute. Garcia does cite one district court opinion, *Joiner v. City of Macon*, 627 F.Supp. 1532, 1535 (M.D. Ga.1986), *rev'd in part on other grounds*, 814 F.2d 1537 (11th Cir.1987),[2] which states that the *Chevron* factors "are a compendium of federal common law principles for use in the absence of federal statutory provisions." *Joiner*'s statement, however, is dictum in view of the court's additional conclusion that the *Chevron* factors compel retroactivity of *SAMTA I*. *Id.* at 1536. The proposition is further undermined by the fact that every other court to consider the issue of *SAMTA I*'s retroactivity has employed the *Chevron* framework. *See, e.g.*, *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 944 (3d Cir.1985) (finding *SAMTA I* nonretroactive); *Kukla v. Village of Antioch*, 647 F. Supp. 799, 815-16 (N.D.Ill.1986) (same); *Thurmond v. City of Union City*, 628 F.Supp. 146, 148 (W.D.Tenn. 1986) (same).

Garcia's argument also suffers from problems of illogic. Even if *Chevron* is a doctrine of federal common law, there is no statute that sets a Congressional policy on retroactivity contrary to *Chevron*. Here, as in most cases when the Court decides to overrule a precedent, the Constitution and statutes fail to address the problem of retro-

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[2] Another source of possible support for this argument is the opinion of Judge Gibbons dissenting from the denial of rehearing en banc. *Mineo v. Port Authority of New York and New Jersey*, 783 F.2d 42, 42 (3d Cir. 1986). A Third Circuit panel had decided originally that *Chevron* prevented *SAMTA I* from being applied retroactively in certain circumstances. 779 F.2d 939 (3d Cir. 1985). Judge Gibbons would have granted rehearing en banc because "[t]he majority relies on federal common law, of which *Chevron Oil Co. v. Huson* is a part, for its rule of decision. Federal common law, however, never can be applied in contravention of the will of Congress expressed in a duly enacted statute." 783 F.2d at 43. The en banc court, of course, did not adopt Judge Gibbons' position.

activity. As a result, courts must employ doctrines such as *Chevron* to provide a solution. If Congress had addressed the retroactivity issue regarding the mass transit function, then Garcia's argument that a statute should override the *Chevron* common law doctrine would have some force.[3]

A further difficulty with Garcia's argument is that it would never allow a decision holding a new rule of constitutional or statutory interpretation nonretroactive. The new rule, as the definitive expression of the meaning of either the Constitution or a statute, would naturally override any common law principles favoring nonretroactivity. The court would be limited under *Chevron* to considering the retroactivity of new rules of federal common law. But Supreme Court precedent belies that result. In some cases, the Court has applied *Chevron* to limit the retroactivity of cases announcing new principles of constitutional law. *See, e.g., Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) which refused to apply retroactively an earlier decision holding unconstitutional state reimbursement of religious schools for

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[3] Garcia does argue that the 1985 amendments to the FLSA set a Congressional policy on retroactivity. Those amendments did eliminate retroactive liability for the state functions that the Department of Labor's regulations had deemed "traditional" and thus exempt from the FLSA under *National League of Cities*. But section 7 of the amendments specifically states that the 1985 amendments "shall not affect whether a public agency . . . is liable under . . . [FLSA for a violation] occurring before April 15, 1986 [the date of *SAMTA I*], with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985. . . ." Both the House and Senate Committee reports on the 1985 amendments also contain statements that Congress' intent was not to take a position on the retroactivity of *SAMTA I*, except to eliminate liability for state agencies that were exempt from the FLSA under the Labor Department regulations. S. Rep. 159, 99th Cong., 1st Sess. 15 (1985); H. Rep. 331, 99th Cong., 1st Sess. 27-28 (1985), U.S. Code Cong. & Admin. News 1985, p. 651.

some expenses. Other cases have denied retroactivity in statutory construction cases. *See, e.g., Arizona Governing Committee v. Norris,* 463 U.S. 1073, 1075, 103 S.Ct. 3492, 3494, 77 L.Ed.2d 1236 (1983) (Title VII of the 1964 Civil Rights Act); *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 719-23, 98 S.Ct. 1370, 1380-83, 55 L.Ed.2d 657 (1978) (same). These decisions indicate that "all questions of civil retroactivity [are] governed by the standard enunciated in *Chevron Oil," United States v. Johnson,* 457 U.S. 537, 102 S.Ct. 2579, 2594, 73 L.Ed. 2d 202 (1982), whether they concern statutes, the common law, or even the Constitution. We therefore hold that *Chevron* provides the standards we must apply in this case.

B.

Garcia argues that, because the parties in the present case are the same as those in *SAMTA I,* he should not be denied the fruits of his victory in the Supreme Court by a decision not to apply that decision retroactively. He cites two cases to support his position.

In *Noble v. Drexel, Burnham, Lambert, Inc.,* 823 F.2d 849 (5th Cir.1987), this court applied the *Chevron* test to a recent Supreme Court decision concerning arbitration of securities disputes, *Shearson/American Express, Inc. v. McMahon,* —— U.S. ——, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). We held the decision retroactive. But before doing so, we noted a "strong irony" in retroactivity analysis:

> Unavoidably, the losing party in a case which establishes new law sustains a full blast of "retroactivity," otherwise the change in law is merely precatory and without full precedential force. The second loser, however, gets the potential benefits of the analysis suggested by *Chevron Oil.* The McMahons lost first and without hope of escape. We must determine whether Mr. Noble is to suffer the same fate.

823 F.2d at 850.

In *Simpson v. Union Oil Co.*, 369 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969), the Supreme Court expressed a similar view. There, the Court in an earlier case had established a new antitrust rule concerning price fixing by the "consignment" device. *Simpson v. Union Oil Co.*, 377 U.S. 1051, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964). In the earlier case, the Court had reserved the question of whether the equities warranted only prospective application of its new rule. On remand, the district court interpreted this comment as authorizing it, after a consideration of the equities, to deny the benefits of the new rule to the litigant before the Supreme Court, Union Oil. After the appeal from the remand, the Court ruled:

> The question we reserved was not an invitation to deny the fruits of successful litigation of this this petitioner. . . . Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative.

The Supreme Court's holding in *Simpson* and the Fifth Circuit's dictum in *Noble* suggested that retroactivity analysis does not apply to the parties to the case that establishes the new rule. *Simpson*, however, was decided before the Court's decision in *Chevron* established a consistent framework for retroactivity analysis. In addition, the court's comments in *Noble* were dicta, as that case did not concern the parties to the case that established the new rule. Furthermore, the tone of the cited passage indicates that this court found it inequitable that only one party would suffer from the new rule of law. Most important, since *Chevron*, other cases have applied the *Chevron* framework even to the parties to the case that established the new rule.

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), for example, the Court invalidated Pennsylvania's program of reimbursement of religious

schools for providing secular educational services. On remand to the district court after the Supreme Court's decision, however, the court allowed the state to reimburse the schools for services provided before the date of the *Lemon* decision, enjoining only further payments for services performed after that date. The Supreme Court affirmed, though without an opinion for the Court. Chief Justice Burger, announcing the judgment of the Court and the opinion of a four-justice plurality, cited *Chevron* in his conclusion that equitable factors warranted the nonretroactive application of the original *Lemon* ruling, even to the very parties in that case. 411 U.S. 192, 93 S.Ct. 1463, 1467-72, 36 L.Ed.2d 151 (1973). In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982), the Supreme Court invalidated the broad grant of jurisdiction to the bankruptcy courts, but, under the *Chevron* framework, applied the judgment only prospectively to the parties in the case. *Allen v. State Bd. of Elections*, 393 U.S. 544, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969), held changes in Mississippi election law invalid, but refused to set aside elections already held under the law. *Zambuto v. AT & T*, 544 F.2d 1333, 1336 (5th Cir.1977), held that *Chevron* equitable factors compelled making its ruling prospective only from date of decision plus 90 days, even as to the parties in the case. Thus, we conclude that whether a decision should be made retroactively as to the parties in the original case to guarantee the prevailing party the "fruits of its successful litigation" is a factor to be considered under the third prong of the *Chevron* test: the weighing of the equities.

IV

Although in civil litigation, "[t]he usual rule is that federal cases should be decided in accordance with the law existing at the time of decision," *Goodman v. Lukens Steel Co.*, —— U.S. ——, 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987), *Chevron* set up a system to evaluate when

nonretroactivity is proper, and included three factors to be considered in making that decision. The district court in this case concluded that the first *Chevron* factor—whether the new rule overruled "clear past precedent on which litigants may have "clear past precedent on which litigants may have relied"—favored nonretroactivity. The second factor—whether retroactive application will further or retard the operation of the new rule—the district court found to be neutral. Finally, the district court found that the third factor—whether retroactive application could produce substantial inequitable results—strongly favored nonretroactivity. Garcia has attacked each of these conclusions.

A.

There is no question that *SAMTA I* overruled a clear past precedent: "*National League of Cities v. Usery* is overruled." [Citations omitted], 105 S.Ct. at 1021. The real issue presented is whether SAMTA was entitled to rely on the overruled case in its decision not to follow the requirements of FLSA. *See Goodman v. Lukens Steel Co.*, 107 S.Ct. at 2621, which held that the first *Chevron* factor will favor nonretroactivity if the case overruled "clear . . . precedent on which the complaining party was entitled to rely."

We feel that the facts of this particular case prevent our making a straightforward assessment of this factor; however, all of the *Chevron* factors rely on equitable considerations which allow us to extrapolate from the principles underlying them and to apply them to the unwieldy facts here.

A straightforward assessment of this factor would be possible if we could look at *National League of Cities* and decide whether SAMTA had been entitled to rely on that case in refusing to follow the FLSA because that case had provided that mass transit was exempt from the FLSA. *National League of Cities* did not mention mass transit among the governmental functions which were exempt

from FLSA requirements, however. Instead, *National League of Cities* listed a few examples, such as police and fire protection, and then stated that traditional governmental functions such as these were exempt from the FLSA while nontraditional state functions were not exempt. Thus, whether SAMTA was entitled to rely on *National League of Cities* in failing to follow the FLSA depends upon whether public mass transit is a traditional state function or a nontraditional one. Several appellate decisions which reached this issue have held that *National League of Cities* did not protect mass transit, because that function was not traditional.[4] Additionally, the Labor Department passed a regulation effective December 21, 1979, which determined that local public mass transit system is not a "traditional" public function, and thus is not exempted from the FLSA. 29 C.F.R. § 775.2(b)(3). It was this regulation that prompted SAMTA to file this suit for a declaratory judgment.

SAMTA did have, however, numerous persuasive arguments why mass transit should have been categorized as a traditional government function and thus exempted from the FLSA. It had enough arguments, in fact, to convince the district court twice that it was performing a "traditional" function. Finally, it convinced four members of the Supreme Court in *SAMTA I*, (105 S.Ct. at 1021, Powell, J. dissenting). The majority opinion was silent on this question. Garcia argues that having only a credible position under a former precedent is not sufficient to fulfill the first prong of *Chevron*. Rather, Garcia argues that to find that SAMTA had fulfilled this *Chevron* factor in the usual manner, we would have to decide that mass transit in San Antonio was a traditional function

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[4] *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Alewine v. City Council*, 699 F.2d 1060 (11th Cir. 1983); *Kramer v. Newcastle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982); *Francis v. Tallahassee*, 424 So.2d 61 (Fla. App. 1982).

under the *National League of Cities* doctrine. It is impossible for us to make such a determination one way or the other, however, because the Supreme Court has explained that the *National League of Cities* doctrine was "unsound in principle and unworkable in practice." 105 S.Ct. at 1016. In that opinion, the Court spends pages showing how cases under the *National League of Cities* doctrine had reached inconsistent results and *that there was no way* "to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." 105 S.Ct. at 1011. It would therefore be highly ironic for us to sit as a court of appeals following *SAMTA I* and attempt to determine whether mass transit falls on one side or the other of a line that the Supreme Court has declared does not exist and, indeed, has never existed. We therefore think it inappropriate after *SAMTA I* to try to determine whether SAMTA in particular, and mass transit in general, fulfills a 'traditional" public function and was therefore exempt from FLSA prior to *SAMTA I*. With respect to the first prong of the *Chevron* test we can only say that clear precedent was overruled, and the test structure of that precedent, upon which SAMTA relied, was overruled and declared incapable of serving as a basis for reliance. This is the incongruous situation that makes our applying the *Chevron* test more difficult than in many preceding cases.

We believe, however, that the equitable nature of the *Chevron* test gives it enough flexibility to allow us to reach a conclusion as to whether *SAMTA I* should be applied retroactively. Again, there is no doubt that prior to *SAMTA I*, SAMTA had a persuasive argument that it was exempt from the FLSA. SAMTA was relying on the general framework provided by *National League of Cities*, as it undoubtedly had a right to do. SAMTA also had a right to pursue its claim that it was exempt from the FLSA through the courts, and to the Supreme Court

if necessary, to obtain a final resolution. Once it had obtained a district court decision in its favor, SAMTA definitely had a right to rely on that decision unless it was overturned. To be sure, the district court's decision that SAMTA served a traditional function of government was never overturned. Although SAMTA pursued its right to litigate the question of its status as "traditional" or "nontraditional," it never did obtain a final answer because, before it was able to do so, the Supreme Court swept away the framework upon which the question was to be decided. The special fact that distinguishes our case from other retroactivity cases is that not only did the Supreme Court sweep away the framework, but it also declared that framework illogical and unworkable. Thus, since the framework was illogical and unworkable from the start, we cannot go back and routinely determine under the first prong of *Chevron* whether mass transit would have been exempted from the FLSA under the old doctrine. We believe that this radical elimination of the entire test framework upon which SAMTA's status would have been determined fulfills the first prong of *Chevron*—that the case to be applied nonretroactively "must establish a new principle of law . . . by overruling clear past precedent on which litigants may have relied. . . ." *Chevron*, 404 U.S. 97, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971).

B.

The second prong of the *Chevron* test requires examination of whether retroactivity will " 'further or retard [the] operation' of the holding in question." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982). The district court found that this prong of the test was neutral as far as deciding whether retroactive application should govern. The district court found that backpay awards were unnecessary to compel future FLSA compliance. We agree that since all state and

local governments are now aware that *National League of Cities* has been overruled, and that they must comply with the FLSA in the future, "[t]here is no reason to believe that the threat of a backpay award is needed to cause [state and local governments] to amend their practices to conform to [the Supreme Court's decision]." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720-21, 98 S.Ct. 1370, 1381-82, 55 L.Ed.2d 657 (1978). The Third Circuit, which denied retroactivity of *SAMTA I* in a case involving the Port Authority, reached a similar conclusion:

> Now that the Supreme Court has ruled explicitly that no state employees are exempt from FLSA, the Port Authority maintains, there is no reason to believe that state and municipalities will not comply in the future. We agree. The [*SAMTA I*] decision makes the law clear that, in the future, states must comply with FLSA. Regardless of how we decide this case, there is no reason to suspect that states would refuse to be found by FLSA. This situation leaves us free to decide the instant case on its facts and equitable principles without concern for further or retarding the operation of [*SAMTA I*]. The second *Chevron* factor neither favors nor opposes the retroactive application of the [*SAMTA I*] decision.

Mineo v. Port Authority of New York & New Jersey, 779 F.2d 939 (3d Cir. 1985).

Indeed, SAMTA also argues that retroactive FLSA liability might in fact frustrate the *SAMTA I* decision by placing such a burden on municipal and state governments that such governmental functions, and therefore jobs, might have to be eliminated. We think, however, that this argument is best dealt with under the third prong of the *Chevron* test, that is, the equities of retroactivity versus nonretroactivity.

C.

The district court in this case found that the third *Chevron* factor compelled nonretroactivity:

> [T]he third factor which requires consideration of the inequities caused by retroactive application of [*SAMTA I*], compels nonretroactivity of the new rule of law and FLSA coverage. . . . SAMTA structured its conduct based on the reasonable belief that its employees performed a traditional government function. Wage rates and benefit packages were negotiated based on this premise. . . . Having negotiated this package, additional back pay liability would represent a windfall. As the Third Circuit observed in *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d at 946, the courts cannot fairly punish those who are forced to make decisions without immediate guidance from the judiciary and who do so reasonably. This is particularly so where the consistent opinions of this district court found this employment relationship outside FLSA protection. The court need not expressly adopt the cries of "doom and gloom" to taxpayers, riders and recently hired public employees to agree that the third *Chevron* factor mandates nonretroactivity.

While we recognize that SAMTA employees have not been compensated for overtime work in compliance with the FLSA, we find compelling the fact that SAMTA has developed its structure of wages and benefits through meetings with the employees' union representative and that this structure included six types of overtime pay, and took into account the nonapplicability of the FLSA's overtime requirements. The Third Circuit explained in *Mineo* why this background makes retroactive overtime pay inequitable:

> Any public or private organization must manage its revenues to most efficiently provide services at

> the lowest cost. When involved in labor negotiations, the organization poses estimates of how many hours it thinks the employees will work and how much money it has to compensate them. Within those parameters, the organization may opt for various pay structures. For example, some employees may be paid more than others; some compensation may be deferred; or employees may get a higher base pay in return for reduced overtime pay. It appears that the last situation was present in the instant case. Reasonably believing itself to be unshackled from the restrictions of FLSA, the Port Authority offered an attractive base pay that was balanced by lower overtime compensation. The Detectives agreed to this arrangement. The retroactive application of [*SAMTA I*] to this situation would give the Detectives increased overtime pay without any reduction in base pay. To allow the Detectives to get a pay raise premised on retroactive application of an unforeseen decision that was made almost two years after the *end* of the contract period would be inequitable to the Port Authority and would constitute a windfall to the Detectives.

Mineo, 779 F.2d at 946. *See also Morrison, Inc. v. Donovan*, 700 F.2d 1374, 1376 (11th Cir. 1983); *Ramsey v. Harber*, 589 F.2d 753, 760 (4th Cir. 1978), *cert. denied*, 442 U.S. 910, 99 S.Ct. 2823, 61 L.Ed.2d 275 (1979).

Thus, we find that the equities favor nonretroactivity as regards SAMTA for two basic reasons. First, huge back pay awards may very likely cripple the always closely budgeted municipal funds. There is a great difference between, on the one hand, knowing you are subject to a regulation, planning for it and taxing and charging the public for it all along, and, on the other hand, suddenly finding out that, contrary to precedent of the Supreme Court and decisions of the district court, you have been subject to a regulation for several years

and are required to compensate under that regulation for previous years for which tax monies have already been otherwise allocated and spent. Of course, the municipalities and the taxpayers have in some ways benefitted from their exemption from the FLSA. However, the equities do not justify saddling them with huge backpay liabilities when they acted in good faith during all those years, believing for substantial precedential reasons that they were exempt from the FLSA, especially in the light of the next considered equity. The second equity compelling nonretroactivity of the *SAMTA I* decision is that what SAMTA employees have not received in overtime compensation over the past several years, they have received at least partially in other forms. SAMTA must compete for labor in the marketplace against employers who are subject to the FLSA, and so it could not simply subtract the benefits required by the FLSA from its own programs. It would be impossible at this point to calculate how many other benefits SAMTA employees have received instead of these overtime benefits and to subtract the amount from a backpay liability.

V

Thus, after consideration of all three prongs of the *Chevron* test, we find that the retroactive application of *SAMTA I* should be denied. We therefore affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5526

D.C. Docket No. SA-79-CA-458

JOE G. GARCIA, On behalf of himself and others similarly situated,
Plaintiff-Appellant,

versus

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before THORNBERRY, POLITZ, and JOLLY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 9, 1988

Issued as Mandate: Mar. 31, 1988

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-458

JOE G. GARCIA, *et al.*,
Plaintiffs,

vs.

SAN ANTONIO METRO TRANSIT AUTHORITY,
Defendant.

ORDER

[Filed Feb. 25, 1987]

The matters before the Court are the parties' cross motions for summary judgment. The motions, originally filed in 1985, have been regularly supplemented as both sides have promptly and thoroughly advised the Court of developing case authorities. While the motions concern numerous issues such as liability for liquidated damages and prejudgment interest, this opinion will address only the threshold question of the retroactive application of the Supreme Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S.Ct. 1005 (1985), to this case.

When the Supreme Court issued its opinion in *Garcia* in February of 1985, it unfortunately gave no guidance to this Court on remand for further proceedings in SA-79-CA-457 or this case. Nor do the Fair Labor Standards Amendments of 1985 assist in the task, expressly reserving for on-going litigation the question of

pre-April 15, 1986 FLSA liability. U.S. Code Cong. & Ad. News 663 (1985).

In grappling with this question the Court now has the benefit of several other state and federal, district and appellate decisions. These authorities make clear that the proper framework for analysis of the retroactivity question is found in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). That case recognized an exception to the general rule that a court apply the law in effect at the time of decision when necessary to avoid otherwise inequitable results. Three factors are identified for consideration when assessing whether the alleged inequity threatened by retroactive application is sufficient to overcome the general rule. "First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106. Second, the Court must look at the prior history of the rule in question and decide whether retroactive application will further or retard its operation. *Id.* at 106-107. Finally, the Court must examine the practicalities of retroactive application by determining if "substantial equitable results" or "injustice" or "hardship" would result therefrom. *Id.* at 107. All three considerations need not, and likely will not, dictate a singular result to guide the court in making the retroactivity determination. Application of these factors, particularly the first and the third, to this case requires a conclusion of non-retroactivity.

Addressing the first factor, the court finds that SAMTA's reliance on *National League of Cities v. Usery*, 426 U.S. 833 (1976), are creating an exception from FLSA liability for local bus drivers, was reasonable. The *National League of Cities* standard for determining whether a particular employment relationship was subject to Congressional structuring—i.e., whether the em-

ployees were performing a traditional government function—was *the* test prior to Garcia. Not until three years after *National League of Cities* in late 1979 did the Department of Labor issue an interpretative regulation, 44 Fed. Reg. 75628-75630, declaring its intention to enforce federal wage and hour laws against transit workers, based on the *National League of Cities* analysis. The case that resulted in the *Garcia* decision, SA-79-CA-457, was filed immediately thereafter to challenge the constitutionality of this enforcement policy, relying on *National League of Cities.* In 1981 when first addressing the issue in SA-79-CA-457 the Honorable Fred Shannon ruled that SAMTA employees were performing a traditional government function on the basis of *National League of Cities.* Order, November 17, 1981. After this ruling was vacated by the Supreme Court on appeal subsequent to its ruling in *United Transportation Union v. Long Island Rail Road (LIRR),* 455 U.S. 678 (1978), (holding that a commuter passenger and freight railroad was not exempt from FLSA regulations) Judge Shannon again found the interpretive regulation null and void. Order, February 18, 1983. Notably, Judge Shannon's application of the *National League* analysis and his conclusion that transit employees were traditional government workers were never expressly rejected by the Supreme Court. *National League* was also the focus of the first round of arguments when SA-79-CA-457 went to the Supreme Court for the second time in 1983. Although characterized by some as a logical progression from recent decisions of the Supreme Court, the majority of observers have found the *Garcia* opinion and its wholesale rejection of precedent announced only nine years earlier an unforeseen change in the law. *See e.g., Mineo v. Port Authority of New York & New Jersey,* 779 F.2d 939 (3rd Cir. 1985); *Dove v. Chattanooga Area Regional Transportation Authority,* —— F. Supp. ——, No. Civ. -1-10-249 (S.D. Tenn. 1986); *Kartevold v. Spokane Co. Fire Protection District,* 625 F. Supp. 1553 (E.D. Wash. 1986).

The Court also finds that SAMTA's reliance on *National League of Cities* and prior decisions by Judge Shannon in ordering its conduct was reasonable and pursued in good faith. In this regard the Court notes that SAMTA's conduct was premised on the advice of counsel. *See* Affidavit of Wayne M. Cook, January 17, 1986, in SAMTA's Supplemental Appendix filed January 22, 1986. Following the issuance of the interpretative regulation by the Department of Labor, SAMTA commenced and vigorously litigated its challenge to that regulation through SA-79-CA-457, twice obtaining favorable decisions from the district court. Finally, after the Supreme Court abandoned *National League* and the state employee exception to FLSA coverage, SAMTA quickly adopted overtime payment practices consistent with Garcia. Cook Affidavit. The procedural history of this litigation reflects the reasonableness of SAMTA's reliance and the above described conduct adequately demonstrates good faith.

The second Chevron factor—whether retroactive application of *Garcia* will further or retard operation of the rule announced—neither favors nor disfavors retroactivity. *See e.g., Mineo v. Port Authority of New York & New Jersey*, 779 F.2d at 945. Further adherence to *Garcia* is assured regardless of what this court does with respect to the backpay liability issue.

In contrast, the third factor which requires consideration of the inequities caused by retroactive application of *Garcia*, compels nonretroactivity of the new rule of law and FLSA coverage. As noted above, SAMTA structured its conduct based on the reasonable belief that its employees performed a traditional government function. Wage rates and benefit packages were negotiated based on this premise. *See* Affidavit of Edward F. Carr, January 17, 1986, in SAMTA's Supplemental Appendix filed January 22, 1986. Having negotiated this package, additional backpay liability would represent a windfall.

As the Third Circuit observed in *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d at 946, the courts cannot fairly punish those who are forced to make decisions without immediate guidance from the judiciary and who do so reasonably. This is particularly so where the consistent opinions of the district court found this employment relationship outside FLSA protection. The court need not expressly adopt the cries of "doom and gloom" to taxpayers, riders, and recently hired public employees to agree that the third *Chevron* factor mandates nonretroactivity.

Having determined that the *Garcia* decision should not be applied retroactively, the Court must rely on *National League of Cities* one last time and ask whether the plaintiffs in this suit performed a traditional government function and were therefore exempt from federal overtime requirements before the *Garcia* ruling. Neither party has vigorously urged rejection of Judge Shannon's consistent position on this issue and this Court has found no authority which mandates same. The Court's previous findings and conclusions on this issue, found in its November 17, 1981 and February 18, 1983 Orders in SA-79-CA-457, are hereby ADOPTED. Based on the finding that these employees performed a traditional government function, it is ORDERED that

1) Plaintiffs' motion for summary judgment is DENIED;

2) Defendant's motion for summary judgment is GRANTED; and

3) This matter is DISMISSED with PREJUDICE.

SIGNED and ENTERED this 24th day of February, 1987.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

Fair Labor Standards Act of 1938, 52 Stat. 1060 as amended, 29 U.S.C. §§ 201 et seq.:

MAXIMUM HOURS

SEC. 7. (a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

PENALTIES

SEC. 16. * * * (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employer or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provision of this subsection.

Portal-to-Portal Pay Act of 1947, 62 Stat. 84, 29 U.S.C. §§ 251, et seq.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

29 C.F.R. Part 775

§ 775.2 SPECIAL ENFORCEMENT POLICY CONCERNING STATES AND POLITICAL SUBDIVISIONS.

(a) On June 24, 1976, the United States Supreme Court ruled in *National League of Cities, et al.* v. *Usery*, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA) are not constitutionally applicable to the integral operations of the States and their political subdivisions in areas of traditional governmental functions. Such areas include, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. They do not include, among others, the operation of a railroad by a State, 426 U.S. at 854, n.18.

(b) In view of the *National League* decision, the Secretary will not file suit to enforce the minimum wage and overtime compensation provisions of the FLSA against a State or its political subdivisions unless at least 30 days notice has first been given that, in the opinion of the Administrator, the activities in question are not integral operations in areas of traditional governmental functions. Such notice will be provided either by specific notification of the employing body in question

or by general notification by publication in the FEDERAL REGISTER in the form of amendments to § 775.3. A reasonable opportunity will be allowed the employing body, after the notice of the administrative determination, to come into compliance voluntarily before suit is brought.

(c) Each such notice will be made available to wage-hour reporting services and to any interested person or association, for information or further publication, except for deletions reasonably necessary to protect the privacy of individual employers and employees.

(d) Because of the complexity of the questions raised by the *National League* decision, it would be inappropriate to seek liquidated damages in addition to back pay in cases to enforce the minimum wage and overtime compensation provisions of the Act against States or their political subdivisions, except as to activities determined by prior controlling judicial decision, or by prior administrative ruling published in the FEDERAL REGISTER, not to be integral operations in areas of traditional governmental functions. The Secretary will therefore not seek liquidated damages as to activities not covered by such decision or ruling, or for periods of employment prior to the publication of such decision or ruling.

(e) As already noted, the *National League* decision applies only to the minimum wage and overtime compensation provisions of the FLSA. This section and § 775.3 accordingly do not apply to claims arising under:

(1) The Equal Pay Act of 1963 (see *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (C.A. 3, 1976), cert. denied 430 U.S. 946 (1977); *Usery* v. *Charleston County School District*, 588 F.2d 1169 (C.A. 4, 1977); *Pearce* v. *Wichita County*, 590 F.2d 128 (C.A. 5, 1979); *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116 (C.A. 6, 1978); and *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (C.A. 7, 1978)).

(2) The Age Discrimination in Employment Act of 1967 (see *Arritt* v. *Grissell*, 567 F.2d 1267 (C.A. 4,

1977)); *Usery* v. *Bd. of Education of Salt Lake City*, 421 F. Supp. 718 (D. Utah 1976); *Aaron* v. *Davis*, 424 F. Supp. 1238 (W.D. Ark. 1976); and *Remmick* v. *Barnes County*, 435 F. Supp. 914 (D. N.D. 1977).

(3) The child labor provisions of the Fair Labor Standards Act.

(4) The protective provisions of section 15(a)(3) of the Act, making it unlawful to discriminate against any employee for participating or assisting in FLSA proceedings.

[44 FR 75629, Dec. 21, 1979]

§ 775.3 NONTRADITIONAL FUNCTIONS OF STATES AND THEIR POLITICAL SUBDIVISIONS.

(a) In the *National League* decision, it was made clear that the operation of a railroad by a State or its political subdivision is not an integral operation in the area of traditional governmental functions. 426 U.S. 833, 854 n.18.

(b) For the purpose of the notice referred to in § 775.2(b), the Administrator has determined that the following functions of a State or its political subdivisions are not traditional. From time to time, this section will be amended to list other such functions determined not to be traditional. The date listed after each function is the date of original publication in the FEDERAL REGISTER. This is the effective date of the general notification described in § 775.2(b). However, where an employing body has actual notice on an earlier date of the position taken by the Administrator, that earlier date is the effective date of the specific notification described in § 775.2(b).

(1) Alcoholic beverage stores December 21, 1979.

(2) Off-track betting corporations December 21, 1979.

(3) Local mass transit systems December 21, 1979.

(4) Generation and distribution of electric power December 21, 1979.

(5) Provision of residential and commercial telephone and telegraphic communication December 21, 1979.

(6) Production and sale of organic fertilizer as a by-product of sewage processing December 21, 1979.

(7) Production, cultivation, growing or harvesting of agricultural commodities for sale to consumers December 21, 1979.

(8) Repair and maintenance of boats and marine engines for the general public December 21, 1979.

[44 FR 75630, Dec. 21, 1979]

§ 775.4 TRADITIONAL FUNCTIONS OF STATES AND THEIR POLITICAL SUBDIVISIONS.

(a) In the *National League* decision, it was made clear that schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation are traditional functions or activities of States and their political subdivisions.

(b) In addition, the Administrator has determined that the following functions of a State or its political subdivisions are traditional (From time to time, this section will be amended to list other such functions determined to be traditional.)

(1) Libraries.

(2) Museums.

[44 FR 75630, Dec. 21, 1979]

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(2)

No. 88-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOE G. GARCIA, *et al.*,

Petitioners,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court of appeals correctly rule that the principles articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), govern the question whether this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) ("*SAMTA I*"), should be applied retroactively?

2. Did the court of appeals correctly apply the *Chevron Oil* principles in ruling that under the particular facts of this case *SAMTA I* cannot be applied retroactively to the operations of the San Antonio Metropolitan Transit Authority ("SAMTA")?

3. Since Petitioners argued to the court of appeals that it could not apply the *National League* traditional function test in deciding the appeal in this case, can Petitioners now challenge the court of appeals' judgment on the ground that the court failed to determine whether SAMTA's operations are "traditional" under *National League of Cities v. Usery*, 426 U.S. 833 (1976)?

4. Having determined that *SAMTA I* cannot be applied retroactively to SAMTA, was the court of appeals correct in not deciding whether SAMTA's operations are "traditional" under *National League*?

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IN THE

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OCTOBER TERM, 1988

NO. 88-39

JOE G. GARCIA, *et al.*,

Petitioners,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,

Respondent.

Respondent respectfully submits that this case does not present any issue worthy of review by this Court and that the petition for certiorari should be denied. In rendering its decision, the Fifth Circuit Court of Appeals correctly applied the well-established principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to the specific facts of this case. The Fifth Circuit's decision does not conflict with any other circuit court decision. Indeed, all three other circuit courts that have addressed this issue have applied *Chevron Oil* in a manner that is consistent with the Fifth Circuit's decision. Furthermore, this case turns on the unique facts and litigation history applicable to the San Antonio Metropolitan Transit Authority. Accordingly, the Fifth Circuit's decision has no significance or policy import beyond the particular facts and parties in this case.

STATEMENT OF THE CASE

A. The *National League of Cities* Decision.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the 1974 amendments to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, which extended the FLSA's minimum wage and overtime provisions to state and local government employees, were unconstitutional insofar as they "directly displaced the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." 426 U.S. at 852. The Court did not identify all constitutionally protected state activities, but listed by way of example "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851. The Court expressly overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), and thereby extended constitutional immunity to schools and hospitals. 426 U.S. at 855. The Court made it clear that these listed activities were merely "examples" and were "obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." *Id.* at 851 n.16.

On remand, the trial court in *National League* recognized that this Court's decision left a gray area for future resolution. *National League of Cities v. Marshall*, 429 F. Supp. 703, 705-06 (D.D.C. 1977). As a result, on June 24, 1977, the Secretary of Labor issued regulations (29 C.F.R. §§ 775.2 & 775.3) under which the Wage and Hour Administrator was to determine those operations against which he would seek to enforce the FLSA. In discussing these regulations, the remand court in *National League* ruled that "[i]n

the event the Labor Department issues a ruling with which plaintiffs or any member of their class disagrees, a court would have jurisdiction to enter such protective order as it may deem appropriate." 429 F. Supp. at 706.

B. The Proceedings Involving SAMTA.

By letter dated September 17, 1979, the Deputy Wage and Hour Administrator concluded that "publicly operated local mass transit systems such as the San Antonio Transit System" are not traditional governmental functions under *National League.*[1] On November 21, 1979, SAMTA filed an action against the Secretary of Labor (hereinafter called *"SAMTA I"*) for a declaratory judgment that under *National League* the FLSA's minimum wage and overtime provisions are inapplicable to its operations. Later the same day, SAMTA's operators brought this separate action (*"SAMTA II"*) for violation of the FLSA. The district court stayed *SAMTA II* while *SAMTA I* was litigated.

On November 17, 1981, the district court held in *SAMTA I* that SAMTA's operations are immune under *National League.* On direct appeal, this Court vacated the judgment and remanded for further consideration in light of its intervening decision in *UTU v. Long Island R.R.*, 455 U.S. 678 (1982). *Donovan v. San Antonio Metropolitan Transit Authority*, 457 U.S. 1102 (1982).

On February 18, 1983, the district court reentered summary judgment in favor of SAMTA. *San Antonio Metropolitan Transit Authority v. Donovan*, 557 F. Supp. 445. The Secretary of Labor and Joe G. Garcia

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[1] Dep't of Labor, Wage and Hour Division., Opinion WH-499, *reprinted in* Wage and Hour Manual (BNA) 91:1138-40.

(who had intervened in *SAMTA I*) both appealed directly to this Court. Rather than deciding whether transit is a traditional governmental function, the Court set the case for reargument on a completely different question—"whether or not the principles of the Tenth Amendment as set forth in *National League* . . . should be reconsidered." *Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213 (1984).

On February 19, 1985, this Court overruled *National League* and, on that basis alone, reversed the district court's judgment in *SAMTA I*. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court Majority—like the district court—could find no principled basis on which to distinguish transit from the traditional activities listed in *National League*. The Majority accordingly found "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' " 469 U.S. at 546-47.

Following remand, the parties dismissed *SAMTA I*, thereby ending the Secretary's involvement in the litigation and permitting SAMTA's bus operator employees to assert their claims for retroactive back pay in *SAMTA II*. On February 24, 1987, the district court ruled in *SAMTA II* that this Court's decision in *SAMTA I* could not be applied retroactively to SAMTA's operations, and it accordingly granted summary judgment in favor of SAMTA.[2]

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[2] *Garcia v. San Antonio Metropolitan Transit Auth.*, No. SA-79-CA-458 (W.D. Tex. 1987)(reproduced as Appendix B to Petitioner's Petition for Writ of Certiorari).

On March 9, 1988, the Fifth Circuit Court of Appeals unanimously affirmed the district court's judgment. Following the lead of virtually every other state and federal court to consider the issue, the Fifth Circuit held that the retroactivity issue in this case is controlled by the principles announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

Applying *Chevron Oil*, the Fifth Circuit held that *SAMTA I* overruled the clear past precedent of *National League*. Although *National League* did not specifically identify transit as a traditional function, the court concluded that *National League* provided a "general framework" upon which SAMTA had a right to rely and that SAMTA had "numerous persuasive arguments" that transit was traditional, which were sufficient to convince the district court twice and four members of the Supreme Court in *SAMTA I* that it was performing a traditional function. Pet. 14a.[3] In keeping with the arguments advanced by Petitioners on appeal in that court, the Fifth Circuit held that since this Court had "declared the [*National League*] framework illogical and unworkable," it would be inappropriate for the court to consider whether SAMTA was in fact traditional under the old *National League* doctrine. Pet. 16a. It accordingly concluded that the first prong of *Chevron Oil* was satisfied.

Relying on *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720-21 (1978) and *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d

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[3] The Fifth Circuit's opinion is reported at 838 F.2d 1411. It is reproduced as Appendix A to the Petition for Writ of Certiorari. References in this brief to the Fifth Circuit's decision are cited to the pages in Appendix A.

939, 945 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986), the Fifth Circuit held that retroactivity would not further the operation of the *SAMTA I* holding. It thus concluded that the second prong of the *Chevron Oil* test did not favor retroactivity. Pet. 16a-17a.

With respect to the third part of the *Chevron Oil* test, the Fifth Circuit held that retroactivity would be inequitable. It based this holding on the fact that a backpay award could cripple municipalities' "always closely budgeted municipal funds," and on its conclusion that "the equities do not justify saddling them with huge backpay liabilities when they acted in good faith during all those years, believing for substantial precedential reasons that they were exempt from the FLSA . . . ." Pet. 19a-20a. The court held that a second equity compelling nonretroactivity was the fact that SAMTA's employees had received many other benefits instead of FLSA overtime benefits. Pet. 19a. This was based on the court's finding that "SAMTA has developed its structure of wages and benefits through meetings with the employees' union representative and that this structure included six types of overtime pay, and took into account the nonapplicability of the FLSA's overtime requirements." Pet. 18a.

C. The 1985 FLSA Amendments.

While *SAMTA II* was under consideration, Congress passed the 1985 Amendments to the FLSA. Pub. L. No. 99-150, 99 Stat. 787 (1985)(currently codified, as amended, at 29 U.S.C.A. § 201, *et seq.* (1987)). These Amendments postponed until April 15, 1986 the FLSA's application to state and local activities denominated "traditional" in the Department of Labor regulations. *Id.* § 6. The Amendments intention-

ally took no position on the retroactivity of *SAMTA I* to transit and left that issue for resolution by the courts. See discussion, *infra*, pp. 9-10.

REASONS FOR DENYING THE WRIT

Petitioners' articulated reasons for seeking certiorari do not fit within any of the recognized grounds for invocation of this Court's discretionary jurisdiction. The Fifth Circuit applied settled case law to the facts of this case and properly held that *SAMTA I* is not retroactive. Its decision does not conflict with any other court of appeals decision, nor with any decision of this Court. It involves an issue that was resolved based on the unique facts of this case, which are of importance only to the parties to this action, and it does not deal with a subject that is likely to recur in other cases. Since this case was properly decided and does not fit any of the accepted standards for granting Supreme Court review, the petition for writ of certiorari should be denied.

I. THE FIFTH CIRCUIT PROPERLY APPLIED *CHEVRON OIL* TO THE *SAMTA I* RETROACTIVITY QUESTION.

As their first reason for seeking certiorari, Petitioners assert that *Chevron Oil* established a common law doctrine that cannot be applied to the question of *SAMTA I*'s retroactivity. Petitioners concede that there is no split in the circuits on this issue and that the other circuits that have considered the question have applied *Chevron Oil*.[4] The only direct sup-

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[4] *Ackinclose v. Palm Beach County*, 845 F.2d 931 (11th Cir. 1988); *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986). After the petition was filed in this case, the Ninth Circuit also applied *Chevron Oil* in holding that *SAMTA I* is not retroactive. *Austin v. City of Bisbee*, No. 87-1595 (9th Cir. Aug. 29, 1988).

port Petitioners cite for their common law proposition is the dissenting opinion in *Mineo*, which hardly creates the conflict necessary to merit Supreme Court review.

Petitioners' argument that *Chevron Oil* is inapplicable is based solely on section 10(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259(a). Section 10(a) provides in pertinent part as follows:

> Reliance in future on administrative rulings, etc.—
>
> a. In any action or proceeding based on any act or omission on or after [the date of the enactment of this Act], no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the [FLSA] . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in *reliance on any written administrative regulation, order, ruling, approval or interpretation* of ["the administrator of the Wage and Hour Division of the Department of Labor"], or *any administrative practice or enforcement policy* of such agency with respect to the class of employers to which he belongs. [emphasis added]

Section 10(a), on its face, only applies to reliance on regulations, practices and other pronouncements from the Wage and Hour Administrator of the Department of Labor. Section 10(a) does not even purport to address the issue of retroactivity where an employer has relied on a *judicial* decision that is overruled. Petitioners accordingly cannot legitimately contend that section 10(a) precludes application of

Chevron Oil in FLSA actions since it is totally silent on the subject.

The inapplicability of section 10(a) to the retroactivity issue is buttressed by the 1985 Amendments to the FLSA. Public Law No. 99-150, 99 Stat. 787 (1985). These Amendments (§ 2(c)) eliminated retroactive liability for functions determined to be "traditional" in the Department of Labor's regulations, but took no position on the question whether activities deemed nontraditional by the Labor Department should be subject to retroactive liability. In this regard, section 7 of the Amendments provides as follows:

> The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6, 7 or 11 of such Act occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

The Senate Report unambiguously shows that the purpose of this provision was to assure congressional neutrality on *SAMTA I*'s retroactivity to transit systems:

> The Committee is aware that the question whether transit employees, prior to the decision in *Garcia*, were entitled to FLSA compensation for overtime hours worked is still being litigated in federal court. *The amendments are intended to*

> *protect the rights of both sides to resolve their differences through litigation, without taking a position on the matter.*

S. Rep. 159, 99th Cong., 1st Sess. 15, *reprinted in* 1985 U.S. Code Cong. & Ad. News 651, 663 (emphasis added). The House Report contains a similar statement. H.R. Rep. No. 331, 99th Cong., 1st Sess. 27-28 (1985). If Congress intended for section 10(a) to control the retroactivity question, it would not have intentionally reserved resolution of that issue for the courts.

Petitioners erroneously fault the Fifth Circuit for relying on cases in which this Court applied Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) to pension plans and declared its decisions to be nonretroactive.[5] Petitioners contend that these decisions "are simply irrelevant because neither the Constitution nor any statute declares a rule respecting the retroactivity of decisions in these contexts." Pet. 12-13. Petitioners' effort to distinguish these Title VII cases is manifestly wrong because Title VII contains a provision that is almost the mirror image of section 10(a) of the Portal-to-Portal Act. Section 713(b) of Title VII provides as follows:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice *if he pleads and proves that the act or omission complained of was*

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[5] *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

> *in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission* . . . .

42 U.S.C. § 2000e-12(b)(emphasis added). Section 713(b) is "virtually identical" to section 10(a) of the Portal-to-Portal Act. *Spirt v. Teachers Ins. & Annuity Ass'n*, 93 F.R.D. 627, 655 (S.D.N.Y. 1982).

Petitioners' reliance on *Milwaukee v. Illinois*, 451 U.S. 304 (1981) is misplaced. *Milwaukee* involved the question whether preexisting common law could be applied in the face of a federal statute dealing with the very same problem (*i.e.*, overflows from a sewer system). This Court held that the federal common law must yield to the statute:

> There is no "interstice" here to be filled by federal common law: overflows are covered by the Act and have been addressed by the regulatory regime established by the Act. Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the Act, such disagreement alone is no basis for the creation of federal common law.

451 U.S. at 323.

Milwaukee actually supports the Fifth Circuit's decision in this case. In *Milwaukee*, the federal common law and the federal statute dealt with precisely the same subject matter, and the federal law was deemed controlling. In the instant case, section 10(a) of the Portal-to-Portal Act does not address the question of retroactive application of a Supreme Court decision that overruled past precedent, and therefore section 10(a) clearly does not deal with the same subject to

which *Chevron Oil* applies. Petitioners in effect would have this Court rewrite section 10(a) to require retroactive liability where an employer has relied on an overruled Supreme Court decision. Only Congress can perform such a task. *See Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984).

As this Court stated in *United States v. Johnson*, 457 U.S. 537 (1982), "*all* questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil* . . . ." *Id.* at 563 (emphasis added). "All questions" include the one in this case.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE *CHEVRON OIL* TEST IN FINDING *SAMTA I* TO BE NONRETROACTIVE.

The insubstantiality of the petition is underscored by the fact that Petitioners have taken a scatter-gun approach and claim that certiorari is required because the Fifth Circuit allegedly erred in applying each and every part of the *Chevron Oil* test. As this section of Respondent's opposition confirms, the Fifth Circuit's treatment of the three *Chevron Oil* factors was clearly correct, it was consistent with other circuit and Supreme Court decisions, and it was tailored to the unique facts of *this* case—all of which demonstrate that the petition for certiorari is groundless.

A. The Fifth Circuit Correctly Held that *SAMTA I* Overruled Clear Past Precedent on Which SAMTA Had Reasonably Relied.

Under the first prong of the *Chevron Oil* test, a decision to be applied nonretroactively must

> establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first

> impression whose resolution was not clearly foreshadowed . . . .

404 U.S. at 106 (citations omitted).[6] In seeking certiorari, Petitioners, in substance, contend that the Fifth Circuit misapplied the first *Chevron Oil* factor because *National League* did not mention transit and therefore SAMTA could not reasonably rely on *National League* in structuring its operations.

Petitioners' contention is plainly wrong. In *National League*, the Court intentionally did not list all activities that it considered traditional. It carefully stated that the specific activities mentioned in its decision were merely "examples" and were "obviously *not an exhaustive catalogue* of the *numerous* line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 851 n.16 (emphasis added). Since this Court did not attempt to identify all traditional activities, but instead articulated general guidelines, it must have intended for responsible public entities, such as SAMTA, to use *National League* as the framework

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[6] Because this Court's decision in *SAMTA I* overruled clear past precedent, there was no need for the courts below to consider the second, alternative prong of the first part of the *Chevron Oil* test—whether the decision "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed . . . ." 404 U.S. at 106. If the court below had found SAMTA's operations to be nontraditional, *Chevron Oil* would still require a ruling of nonretroactivity since such a decision would involve an issue of first impression that was not foreshadowed by any Fifth Circuit or Supreme Court precedent. *Cf. Ferrell v. Pierce*, 785 F.2d 1372, 1386 (7th Cir. 1986)(district court's decision on issue of first impression held nonretroactive). To this very day, there is no precedent in the Supreme Court or the Fifth Circuit that transit is not traditional.

for determining if they were performing a traditional function. This Court's decision in *National League* thus was a "hard fact[] on which [SAMTA had to] rely in making decisions and in shaping [its] conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973). The Third Circuit captured the essence of this point in *Mineo*:

> Applying *Garcia* retroactively would punish the Port Authority for having made a decision which we agree is based on an accurate assessment of the law at the time such decision was made. In the normal business setting, a party must take action and cannot wait indefinitely for precise judicial resolutions; courts should recognize this fact and not punish unfairly those who engage in reasonable business decision-making.

779 F.2d at 946. *See also Ackinclose v. Palm Beach County*, 845 F.2d 931, 934 (11th Cir. 1988)(overruling of *National League* "signaled 'an abrupt and fundamental shift in doctrine' that established 'an entirely new rule which in effect replaced an older one.' ") (quoting *Hanover Shoe, Inc. v. United Shoe Machine Co.*, 392 U.S. 481, 498 (1968).

The Fifth Circuit held that SAMTA had "numerous persuasive arguments why mass transit should have been categorized as a traditional government function and thus exempted from the FLSA." Pet. 14a. Indeed, SAMTA twice convinced the federal district court that transit is traditional. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964)(retroactivity denied where "respectable authorities, *including the court below*," supported reasonableness of appellant's reliance (emphasis

added)); *Ramey v. Harber*, 589 F.2d 753, 759 (4th Cir. 1978)("If this court could not foresee the [Supreme Court's] decision . . ., we certainly cannot agree that [the defendant] should have anticipated that his actions would be condemned by this new development in constitutional law."). SAMTA likewise convinced four Justices of this Court that transit is traditional, and the Majority of the Court itself could not identify any "organizing principle" on which to distinguish SAMTA's operations from the activities specifically listed as traditional in *National League*.[7] *SAMTA I*, 469 U.S. at 539.

The rationale in this Court's decision in *SAMTA I* itself underscores the reasonableness of SAMTA's reliance on *National League*. The Majority in *SAMTA I* specifically rejected the principal arguments advanced by the Government and Garcia in *SAMTA I* for the proposition that transit is not traditional—*i.e.*, that (1) historically transit has not been provided by state and local governments, (2) transit's receipt of federal funds makes transit nontraditional, and (3) transit is a business activity, subject to regulation when it acts as a market participant. The Majority emphatically disapproved the use of an historical test, stating that "[r]eliance on history as an organizing principle results in linedrawing of the most arbitrary sort." 469 U.S. at 544. In rejecting the argument that receipt of federal funds determines whether the FLSA can constitutionally be applied to state and

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[7] The brief SAMTA filed in this Court in *SAMTA I* on the traditional function issue on February 3, 1984 compares public transit to the activities specifically listed as traditional and shows that transit cannot be distinguished from them on a principled basis.

local governments, the Court noted that the activities exempted in *National League* had also received federal funding, *id.* at 553, and concluded that the constitutionality of the FLSA's application to transit would be unaffected "even had Congress not provided federal funding . . . ." *Id.* at 555 & n.21. Lastly, the Court held that the business/nonbusiness distinction once used in the tax immunity cases was as "unworkable" in the Commerce Clause context as in the field of tax immunity. *Id.* at 543.[8]

B. The Fifth Circuit Correctly Held that Retroactivity Will Not Further the Purpose of the Rule Announced in *SAMTA I* .

The Fifth Circuit's ruling that retroactivity will not further the rule in *SAMTA I* is manifestly correct. The rule in *SAMTA I* can be stated broadly or narrowly. Broadly, the rule is that courts generally cannot review Congress' exercise of its Commerce Power against the States. Narrowly, as construed by the Fifth Circuit, the rule is that state and local governments must comply with the FLSA in the future.

The broad rule will not be advanced by retroactivity because acts of Congress will be nonreviewable by the courts regardless of whether a backpay remedy is extracted through retroactive application of the Court's decision. The narrow rule will not be furthered because backpay awards are unnecessary to compel future FLSA compliance. Since all state and

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[8] The Court thus rejected the principal underpinning for the Deputy Administrator's 1979 transit letter, which relied on obsolete tax cases for its hypothesis that transit is a business activity and therefore not covered by *National League*. Dep't of Labor, Wage and Hour Div., Opinion WH-499 (Sept. 17, 1979), *reprinted in* Wage and Hour Manual (BNA) 91:1138-40.

local governments are now aware that *National League* has been overruled, and that they must comply with the FLSA in the future, "[t]here is no reason to believe that the threat of a backpay award is needed to cause [state and local governments] to amend their practices to conform to [the Supreme Court's decision]." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720-21 (1978).

Since retroactive liability is unnecessary to compel SAMTA's future compliance with the FLSA, the second *Chevron Oil* prong clearly does not favor retroactivity under the facts in this case. The other circuit courts that have considered this question have reached the same conclusion.[9] The fact that Petitioners reject these decisions out of hand and instead rely on a dissent in *Mineo*, 779 F.2d at 954 (Becker, J., dissenting), exposes the weakness of their position.

C. The Fifth Circuit Correctly Held that the Equities in this Case Require Nonretroactivity.

The third prong of the *Chevron Oil* test is whether retroactivity of *SAMTA I* " 'could produce substantial inequitable results . . . .' " *Chevron Oil*, 404 U.S. at 107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). In the instant case, the Fifth Circuit held that the equities require nonretroactivity because of the substantial, unexpected liability that could befall SAMTA and because of the windfall SAMTA's employees would receive. Pet. 19a-20a.

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[9] *Ackinclose v. Palm Beach County*, 845 F.2d 931, 935 (11th Cir. 1988); *Mineo v. Port Auth. of New York & New Jersey*, 779 F.2d 939, 945 (3d Cir. 1985), *cert. denied*, 478 U.S. 1005 (1986). In *Austin v. City of Bisbee*, No. 86-3778 (9th Cir. Aug. 29, 1988), the Ninth Circuit held that "retroactive application" of *SAMTA I* "would actually hinder its prospective application . . . ."

Petitioners' challenge to the Fifth Circuit's holding is based in large part on the unique facts of this particular case. For example, the Fifth Circuit found "compelling the fact that SAMTA has developed its structure of wages and benefits through meetings with the employees' union representative and that this structure included six types of overtime pay, and took into account the nonapplicability of the FLSA's overtime requirements." Pet. 18a. Petitioners attack this finding because public sector collective bargaining is illegal in Texas and the Fifth Circuit's "notion that these were arms-length negotiations" is "illusory." Pet. 21. Petitioners' argument overlooks the detailed, undisputed affidavit of Edward F. Carr, which SAMTA submitted in support of its motion for summary judgment. Mr. Carr's affidavit chronicles the history and content of these meetings and reflects that even though public strikes are illegal in Texas, the union pursued its discussions with SAMTA with such vigor that work stoppages have occurred five times. Mr. Carr's affidavit also supports the Fifth Circuit's finding that SAMTA's wages and benefits have been structured through arrangements with SAMTA's employees' union representative in a manner that assumes the nonapplicability of the FLSA and which provides substantial other benefits. The Fifth Circuit's holding is fully supported by the record evidence. Furthermore, it is consistent with the Third Circuit's decision in *Mineo, supra*, 779 F.2d at 939.

Similarly, the Fifth Circuit's conclusion that the equities favor nonretroactivity because of the substantial burden that would otherwise be placed on the municipal budget is unquestionably supported by the decisions of this Court. *See, e.g., Arizona Governing*

Committee v. Norris, 463 U.S. 1073, 1092 (1983); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 721-23 (1978).

III. THE FIFTH CIRCUIT'S FAILURE TO REAPPLY THE *NATIONAL LEAGUE* TEST IN THIS CASE WAS PROPER AND, IN FACT, WAS INVITED BY PETITIONERS' APPELLATE BRIEFS.

As their final basis for seeking certiorari, Petitioners fault the Fifth Circuit for declining to apply a test which this Court held "was illogical and unworkable from the start." Pet. 16a; see *SAMTA I*, 469 U.S. at 546-47. Petitioners fail to disclose that the Fifth Circuit did exactly what Petitioners requested in their briefs to that court.

In their opening brief to the Fifth Circuit, Petitioners argued against any reapplication of the *National League* test to SAMTA's operations:

> It would indeed be a strange principle of federal common law if a district court could use the *Chevron* doctrine to deny application of a Supreme Court decision and reapply to the same parties who had litigated the issues in a companion case a legal standard found unworkable and unacceptable by the Supreme Court. . . .
>
> It is unnecessary to rethink or reapply the "traditional governmental functions" test.

Brief for Appellants pp. 50-51.

In their reply brief in the Fifth Circuit, Petitioners reemphasized their adamant stand that the Fifth Circuit could not reapply the *National League* test to SAMTA's operations:

> No principle of jurisprudence could possibly support the bizarre result that a rationale and ruling reversed by the Supreme Court could be resurrected and enforced by the district court on remand. Indeed, the very attempt to apply the rule in *National League* would require this Court to reverse the *Garcia* rejection of the rule "as unsound in principle and unworkable in practice." 469 U.S. at 546.

Reply Brief for Appellants p. 33.

Since Petitioners argued that the Fifth Circuit could not apply the *National League* test in this case, they cannot now be heard to complain because the Fifth Circuit heeded their plea.[10]

Furthermore, even if Petitioners could complain, there is no cause for reversing the Fifth Circuit's decision. The Fifth Circuit resolved this dispute in a principled manner by concluding that SAMTA reasonably relied on *National League* and had a legitimate basis for determining that its transit operations were a traditional function. Under these circumstances, there was no reason for the court to attempt application of a test which this Court has held is "difficult, if not impossible," to apply. *SAMTA I*, 469 U.S. at 539.

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[10] *See, e.g., Glassman Constr. Co. v. United States*, 421 F.2d 212, 215 & n.3 (4th Cir. 1970)(Appellant "should not now be heard to complain that we did what it asked of us."); *Capella v. Zurich General Acc. Liability Ins. Co.*, 194 F.2d 558, 560 (5th Cir. 1952)("counsel may not invite error and then complain of it"). *See also Poston v. Caraker*, 378 F.2d 439, 442-43 (5th Cir. 1967)("[I]t is too fundamental to require citation that [appellants] must stand or fall here on the issues as presented below. They cannot now invoke what might have been.")

Nor does the Fifth Circuit's decision create a direct conflict with the Third and Eleventh Circuits' decisions in *Mineo* and *Ackinclose*. The Fifth Circuit only held that reapplication of the unworkable *National League* test was inappropriate in analyzing the facts of this case under the first part of the *Chevron Oil* test. Having concluded that *SAMTA I* could not be applied retroactively in this case, the Fifth Circuit did not comment on the question of reapplying the *National League* test to determine whether SAMTA was, in fact, engaged in a traditional function. The court's silence in this regard is not surprising since Petitioners vigorously argued to the Fifth Circuit that it could not reapply a test that had been found unworkable by the Supreme Court. Accordingly, it is reasonable to interpret the Fifth Circuit's silence on this point as nothing more than a decision that it need not address the issue since Petitioners themselves took the position that the test should not be reapplied. The Eleventh Circuit, itself, in *Ackinclose* could "see no direct conflict between the result [it reached] and the . . . opinion of the Fifth Circuit." 845 F.2d at 938 n.6.[11]

Unlike the instant case, the court in *Mineo* was compelled to consider the first part of the test for

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[11] Contrary to the exaggerated claim contained in Petitioner's Petition (p. 23), the Eleventh Circuit in *Ackinclose* did not "severely criticize[] the Fifth Circuit's decision." See 845 F.2d at 938 n.6. In fact, the Eleventh Circuit's footnote suggests that the court believed that the Fifth Circuit decided the retroactivity issue based on the unique facts of this particular case, which as the text shows, included the indisputable fact, indelibly etched in Petitioner's briefs to the Fifth Circuit, that they eschewed reapplication of the *National League* test. Furthermore, the court

immunity under *National League—i.e.*, whether the employer in that case, a bi-state port authority, was in fact a state for purposes of the *National League* rule. The court then mechanically applied the traditional function test; however, its use of the test was a mere formality since the employees in question were detectives and *National League* specifically listed police protection as a traditional activity. The court's application of the traditional function test, accordingly, was unnecessary to its decision.

Even if a conflict were marginally presented by these cases, it would not be the type of "real and embarrassing conflict of opinion," *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951), that is necessary to invoke Supreme Court review. Because the issue is not likely to recur, the alleged conflict is not important. As a result of *SAMTA I*, the traditional function test was a transitory part of our constitutional jurisprudence, and unless it becomes the law again, there is no compelling reason to address its continued viability. Indeed, it would be a strange irony for this Court to grant certiorari because a court of appeals failed to apply the very test which this Court has held is unworkable.

In any event, if the Fifth Circuit had applied *National League* to SAMTA's operations, it could only have concluded that SAMTA is in fact engaged in a traditional activity, just as the district court twice ruled in *SAMTA I*. *See* discussion, *supra* pp. 15-16. *See also* SAMTA's brief on the merits in this Court

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in Ackinclose held that the traditional function test should be applied in evaluating the employer's claim that the 1985 FLSA amendments protected it from backpay liability. No such claim has been made in the instant case.

in *SAMTA I* at pp. 13-46. Its failure to apply the *National League* test, even if erroneous, thus would afford no ground for reversal.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

September 8, 1988

Respectfully submitted,

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No. 88-39

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOE G. GARCIA, *et al.*,
Petitioners,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Introduction

The dominant theme of respondent SAMTA's brief in opposition is that this case is "unique" (Br. Opp. 1, 7, 12, 18).[1] But as we show in the Petition, and elaborate briefly in this Reply, the first and second questions presented raise important and recurring issues of non-retroactivity doctrine. The decision below is "unique" in only one material respect, to which the third question is addressed: It is the only case of which we are aware wherein, after this Court overruled a prior precedent, a lower court has determined that the overruling decision is to be applied only prospectively, *and* has nevertheless refused to apply the law stated in the overruled precedent to decide the merits of the case.

Defending this method of decision, SAMTA says that it would be "a strange irony for this Court to grant certiorari because a court of appeals failed to apply the very test which this Court has held is unworkable" (Br. Opp. 22-23); *viz.*, the "traditional government function" test of *National League of Cities* v. *Usery*, 426 U.S. 833. There is a "strange irony" in this case but not the one SAMTA posits. It is that petitioners, who prevailed in *Garcia I*, have not only been denied the benefits of the constitutional ruling in that case, but, because of the very breadth of their victory, have had their claims dismissed without a discussion on the legal theory on which this suit was brought; *viz.*, that public mass transit is not a "traditional government function." And it is both "ironic" and paradoxical that the court below has applied the reasoning of *Garcia I* retroactively *against* the prevailing party in that case, but the ultimate constitutional holding in favor of the prevailing party only prospectively.

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[1] Throughout this Reply, the Petition for Certiorari herein will be cited as "Pet." the Brief for Respondent in Opposition will be cited as "Br. Opp.".

I.

The court below squarely held (Pet. 10a), and respondent agrees (Br. Opp. 12), that "*all* questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97" (Br. Opp. 12, quoting *United States* v. *Johnson*, 457 U.S. 537, 563, respondent's emphasis). In the petition we challenge that holding and submit that *Johnson* is not intended to override the fundamental principle that "federal common law is 'subject to the paramount authority of Congress' ", *Milwaukee* v. *Illinois*, 451 U.S. 304, 313, quoting *New Jersey* v. *New York*, 283 U.S. 336, 348. Only this Court can resolve the tension between the broad and general language of *Johnson* (Pet. 14, n.13) and the holding of *Milwaukee* v. *Illinois* and the precedents there followed. The Court should do so now because the ruling below would overrule all Congressional judgments as to when a reliance defense should be allowed,[2] and because this Court has a special responsibility to preserve "an appropriate division of functions between the Congress and the federal judiciary". *Milwaukee* v. *Illinois*, 451 U.S. at 313.

SAMTA asserts that *Milwaukee* v. *Illinois* is inapposite on the ground that "section 10(a) of the Portal-to-Portal Act does not address the question of retroactive application of a Supreme Court decision that overruled past [judicial] precedent, and therefore section 10(a) clearly does not deal with the same subject to which *Chevron Oil* applies." Br. Opp. 11-12. See also *id.* 8-9

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[2] See, *e.g.*, the statutes cited at Pet. 14, and § 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b). While we regret overlooking that provision (Br. Opp. 10-11), it does not affect our point that the court below erred in relying on this Court's decisions concerning retroactivity in the Title VII/pension context. Pet. 12-13. Those decisions were not based on, and did not mention, § 713(b); indeed, a study of the briefs in those cases shows that the provision was never called to the Court's attention.

(§ 10(a) "on its face" applies only to administrative rulings of the DOL Wage and Hour Administrator.) SAMTA reads *Milwaukee* v. *Illinois* much too narrowly. The Court there reasoned:

> Demanding specific regulations of general applicability before concluding that Congress has addressed the problem to the exclusion of federal common law asks the wrong question. The question is whether the field has been occupied, not whether it has been occupied in a particular manner. [451 U.S. at 324.]

And that preceednt teaches by example, *id.* at 317-324, that this question cannot be answered by looking only at the "face" of *one statutory provision*; all the pertinent legislative materials must be examined.

It is evident from even a brief examination of the legislative materials that the field which the Portal Act occupies (or, in SAMTA's terms, its "subject matter") is not confined to the effect of rulings of the Wage and Hour Administrator of the Department of Labor ("Administrator").

What became the Portal Act was Congress' response to *Anderson* v. *Mt. Clemons Pottery Co.*, 328 U.S. 680, and prior decisions which threatened employers (as well as contracting agencies under cost-plus contracts) with enormous unanticipated liabilities. Employer representatives did not limit their demand for corrective legislation to obtaining relief from the retroactive application of those decisions; the employers also sought protection against unexpected liabilities in the future. But supporters of the covered employees insisted, and the proponents of the bill agreed, that this defense should be narrowly circumscribed to avoid abuse.[3] Congress adjusted these concerns by

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[3] For example, Rep. Walter, one of the Managers of the bill in the House and a member of the Conference Committee, commented:

> The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or in-

making nice distinctions in the statute—as is shown by comparing § 10(a) with §§ 9 and 11, provisions which SAMTA simply disregards.

Section 10(a) provides an employer with a defense to liability for activities engaged in *after* the enactment of the Portal Act only "if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation * * * of the agency of the United States specified" in § 10(b)—as to FLSA, the Administrator. Section 9, which provides a defense for acts *prior to* that statute's enactment, provides that such reliance could be based on "*any* administrative regulation * * * of *any* agency of the United States" (emphasis added).

The contrast between § 10 and § 11 is even more striking. Section 11 gives the courts discretion to eliminate or reduce liquidated damages "if the employer shows to the satisfaction of the court that the act of omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended." Such "reasonable grounds for believing" that the employer's action is not unlawful could be based on the decisions of any agency (such as a contracting officer) or a court.

Plainly, therefore, the Portal Act's scope of application is considerably broader than SAMTA would have it. And, given the judgments Congress made, it is of the essence here that allowing a defense from liability for a violation of the FLSA (governed by § 10a) to be based solely on an employer's showing that his action was in a good-faith belief, and that he had reasonable grounds for believing, that his action is lawful (the lesser showing by which § 11 affords discretionary relief from liquidated dam-

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valid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. [93 Cong. Rec. 4390 (1947)].

ages)—which is precisely what the court below allowed—is wholly inconsistent with the Portal Act.[4]

II.

It is paradoxical for SAMTA to assert that the "insubstantiality of the petition is underscored by the fact that" the Petition urges that the court below erred with respect to each of the *Chevron* factors. (Br. Opp. 12).[5] An abundance of errors, each of which is of independent significance, should render a lower court decision more rather than less vulnerable to review.

A. We begin by noting that the errors of the court below take on added seriousness when viewed in combination because that court's analysis of *Chevron*'s first and second factors are mutually contradictory. The centerpiece of the reasoning below with respect to the first *Chevron* factor is that *Garcia I* makes it impossible for

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[4] SAMTA seizes on the 1985 amendments to the FLSA for an additional argument that § 10 of the Portal Act is inapplicable. Those amendments relieve public agencies of liability for violations of §§ 6, 7 or 11 of the FLSA occurring before April 15, 1986 except with respect to any employee who may have been covered by the FLSA under the Secretary of Labor's special enforcement policy on January 1, 1985, published in 29 C.F.R. § 775.3. As explained in the Committee Report cited by SAMTA, "*[t]he amendments are intended to protect the rights of both sides to resolve their differences through litigation, without taking a position on the matter.*" Br. Opp. 9-10, SAMTA's emphasis. From this, SAMTA argues: "If Congress intended for section 10(a) to control the retroactivity question, it would not have intentionally reserved resolution of that issue for the courts." *Id.* 10. This is a *non sequitur*. By leaving the matter to the courts, Congress undoubtedly intended that the courts would apply the entire corpus of the law, including any statutes which might bear on liability. In contrast a partial repeal of the Portal Act for purposes of this litigation would obviously be "taking a position on the matter".

[5] We believe, in agreement with Judge Friendly, that a decision must be applied retroactively unless the party who urges otherwise satisfies the first *Chevron* factor. *Kremer* v. *Chemical Construction Co.*, 623 F.2d 786, 789 (C.A. 2), cert. denied on this issue, 452 U.S. 960, affirmed on another issue, 456 U.S. 461.

the Courts to determine whether public mass transit is a traditional state function or a nontraditional one "because the Supreme Court has explained that the *National League of Cities* doctrine was 'unsound in principle and unworkable in practice'." Pet. 15a, quoting 469 U.S. at 546. But the court below then wholly disregards that portion of *Garcia I*'s holding in reaching the conclusion that the second *Chevron* factor is neutral. See Pet. 19. SAMTA makes no attempt to resolve this inconsistency.

B. SAMTA's responses concerning the separate *Chevron* factors warrant only brief reply.

(1) We agree that since this Court did not, in *National League of Cities* v. *Usery*, 426 U.S. 833, attempt to identify all traditional activities, "it must have intended for responsible public entities, * * * to use *National League* as the framework for determining if they were performing a traditional function." Br. Opp. 13-14. But, of course, *National League* did *not* hold, or so much as suggest, that public entities would be free from liability, if they chose not to comply with the FLSA's wages and hours requirements, and it were subsequently determined that the activity was not "traditional". While *National League* "was a 'hard fact[] on which [SAMTA had to] rely in making decisions and in shaping [its] conduct' " (Br. Opp. 14, quoting *Lemon* v. *Kurtzman*, 411 U.S. 192, 199), the "hard fact" was that *National League* did *not* immunize all public agency functions and, therefore, could *not* safely be relied on by SAMTA as long as the status of mass transit was in question.

On remand from this Court in the *National League* case, the district court addressed this problem directly; that court entered a decree which, with the cooperation of the Labor Department, provided a "safe harbor" for public agencies, unless and until they were advised that DOL considered a function to be nontraditional. This litigation arose because SAMTA thereupon chose to test the waters by continuing its noncompliance with the FLSA (at the expense of its employees) and adhered to

that choice even after the original remand in *Garcia I*, and the decisions of three Circuits that mass transit is not a traditional governmental activity gave further warning that the waters were hazardous.

The facts just stated materially differentiate the decision below from those in *Mineo* v. *Port Authority of New York & New Jersey*, 779 F.2d 939 (C.A. 3), and *Ackinclose* v. *Palm Beach County, Fla.*, 845 F.2d 931 (C.A. 11), cited at Br. Opp. 14. The *Mineo* Court, in contrast to the court below, emphasized that *Chevron* requires actual "reasonable" reliance on "prior law." 779 F.2d at 944-945. That court then concluded that it was reasonable in that case for the Port Authority to regard its detectives as being "engaged in the activity of police protection," even though the Authority "includes mass transit among its many activities." *Id.* There was, of course, no contrary determination by any agency or court.[6]

Because of the facts before it, the Third Circuit reached the result that *Garcia I* should not be applied retroactively in favor of the plaintiff Detectives; accordingly, we have not argued that there is a conflict of decisions between the Third and Fifth Circuits on the *Chevron* issue. But the *Mineo* court's general approach to the retroactivity issue is totally at odds with that of the Fifth Circuit herein:

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[6] The same is true of *Ackinclose*, which involved a public water utility department. *Austin* v. *City of Brisbee*, 57 U.S. L.Wk. 2156 (C.A. 9, Aug. 29, 1988), cited at Br. Opp. 7, n.4, involves a city's police officers and clearly satisfies the first *Chevron* factor for nonretroactivity.

SAMTA can take no comfort from the passage from *Mineo*, quoted at Br. Opp. 14, which it is said, "captured the essence of [SAMTA's] point". There, in discussing the third *Chevron* factor, the court "agree[d]" that the Port Authority's decision was "based on an accurate assessment of the law at the time [its] decision was made." As is clear from an earlier sentence in the same paragraph from which SAMTA quotes, the Third Circuit's view in that respect was based on its determination *at the next step of its opinion* that the Authority was entitled to prevail under the *National League* test. In this case, however, the Fifth Circuit made no such determination.

> * * * A recent decision is generally applied even to a dispute that arose prior to the court's holding. * * * However, at times application of this retroactivity precept produces inequitable results, penalizing parties who ordered their affairs in reasonable reliance on a rule of law that was later invalidated. * * * Consequently, it has been held that courts in certain circumstances appropriately may determine not to apply a decision retroactively. [774 F.2d at 943.]

The decision below, in contrast, has so diluted the "reasonable reliance" as to virtually nullify the general "principle that courts will apply the law in effect at the time they decide a case." See Pet. 15, quoting *Goodman* v. *Lukens Steel Co.*, 107 S.Ct. 2617, 2621 (June 19, 1987).

(2) One rule of *Garcia I* "is that courts generally cannot review Congress' exercise of its commerce power against the states". Br. Opp. 16. SAMTA is surely wrong in arguing that this rule will "not be advanced by retroactivity here." *Id.* For, necessarily included in that "broad[]" statement of the rule of *Garcia I* is the holding that Congress acted *within its Commerce power* in applying the FLSA to the states. Properly understood, therefore, the rule of *Garcia I* can be effectuated only by so applying the FLSA *from its effective date*; this is especially clear, since making employees whole through the back-pay remedy of § 16(b) is a major element of Congressional policy under the FLSA. See Pet. 18 and *id.*, n. 15, which the brief in opposition disregards.

The foregoing proposition can be stated more generally as it pertains to the second *Chevron* factor: When this Court has held (as in *National League*) that an Act of Congress may not constitutionally be applied in certain circumstances, and thereafter overrules that holding and affirms the constitutionality of the statute, the rule of the later decision can be effectuated *only by* giving the second decision retroactive effect. The situation is in this respect fundamentally different from cases like *Lemon* v. *Kurtzman*, 411 U.S. 192 (Br. Opp. 14) and *Chicot County Dist.* v. *Bank*, 308 U.S. 371, which denied retro-

active effect to decisions holding a law to be *un*constitutional and parties had acted in reliance on, and in compliance with, that law.

(3) SAMTA, while saying that the "equities" factor depends on the facts of this case, disregards our showing that, on principle and precedent, the court below erred by relying on what it treats as a bargain between SAMTA and the union, again, contrary to Congressional policy. Pet. 21-22. Moreover, it is clear that the union did not "assume the nonapplicability of the FLSA" (Br. Opp. 18); the union was vigorously litigating the question during this entire period. Mr. Carr's affidavit on summary judgment (*id.*) is therefore beside the point, even accepting the Fifth Circuit's "bargain" theory.

III.

National League did not hold that state and local governments are constitutionally immune from the FLSA with respect to all of their functions; only "traditional governmental" functions were protected. Yet, under the decision below, petitioners' claims have been dismissed without a determination that public mass transit is a traditional governmental function. This result cannot be reconciled with either *National League* or *Garcia I*.

SAMTA asserts, however, that the Court of Appeals' error was "invited" by petitioners. Br. Opp. 19-20. That statement is demonstrably false. The sentences which SAMTA quotes from petitioners' opening brief in the court below appeared in a section entitled "EVEN ASSUMING THAT *CHEVRON* APPLIES AND REQUIRES THE APPLICATION OF PRE-*GARCIA* LAW, SAMTA'S EMPLOYEES ARE ENTITLED TO AN AWARD OF STATUTORY DAMAGES". Petitioners there argued, *inter alia*, that the District Court had erred in following its own twice-vacated decisions in *Garcia I*, although every Court of Appeals (the Third, Sixth and Eleventh Circuit) which addressed the issue prior to *Garcia I* had held that mass transit operations are nontraditional governmental functions subject to the FLSA. The sentences

which SAMTA quotes from the reply brief appear in a section entitled "SAMTA IS STATUTORILY LIABLE FOR ITS OVERTIME VIOLATIONS UNDER PRE-*GARCIA* LAW". Lest any doubts remain, these sections of the briefs are reproduced in full as an appendix hereto.

The Court of Appeals' action is so contrary to the rule of law and so distorts retroactivity doctrine that review is clearly warranted in the exercise of this Court's supervisory powers over the lower federal courts. However, the decision also conflicts with those of the Third Circuit in *Mineo*, and of the Eleventh Circuit in *Ackinclose*, since those courts *did*, after holding *Garcia I* to apply only prospectively, go on to decide the plaintiffs' claims under *National League*. Pet. 23-24. SAMTA's denial that a "direct" conflict exists is largely an extension of its baseless contention that the error was invited. Br Opp. 21.

In arguing that the conflict does not merit this Court's attention, SAMTA mischaracterizes the issue, which is not the "continued viability" of the "traditional function" test (Br. Opp. 22), but whether, if a court decides that the new rule may be applied only prospectively, it must adjudicate a case under the old rule. That issue can arise in future contexts, especially if—as was held below—reliance on an overruled "general framework" is sufficient to avoid retroactivity.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

BRIEF FOR APPELLANTS
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* * * *

IV. EVEN ASSUMING THAT *CHEVRON* APPLIES AND REQUIRES THE APPLICATION OF PRE-*GARCIA* LAW, SAMTA'S EMPLOYEES ARE ENTITLED TO AN AWARD OF STATUTORY DAMAGES

Even assuming that the district court correctly decided that *Chevron* applies and requires the application here of pre-*Garcia* law, the Court erred by concluded that its two prior rulings in the companion case, construing mass transit to be a "traditional governmental function," constitute the applicable pre-*Garcia* law (R. 8, 9). It would indeed be a strange principle of federal common law if a district court could use the *Chevron* doctrine to deny application of a Supreme Court decision and reapply to the same parties who had litigated the issues in a companion case a legal standard found unworkable and unacceptable by the Supreme Court. That is precisely the result of the district court's decision here. In effect, the district court overruled the *Garcia* decision for purposes of this case and applied its prior "consistent" rulings upholding SAMTA's defense to liability, even though the Supreme Court vacated and reversed each of those rulings.

Contrary to the district court's analysis, the law prior to *Garcia* mandated that SAMTA comply with the FLSA. It is unnecessary to rethink or reapply the "traditional governmental functions" test. First, the 1974 FLSA amendments state that mass transit must comply with the FLSA. 1974 FLSA Amendments, § 21. Second, § 10 of the Portal-to-Portal Act provides that employers must comply with the DOL regulations or be held liable to

their employees for damages. 29 U.S.C. § 259. *See supra* discussion at Section IIB. The DOL's post-*National League* regulations notified public employers of their statutory liability for FLSA violations occurring in functions defined by the Administrator as "non-traditional," 29 C.F.R. § 775.2, and, since 1979, the DOL has defined mass transit to be a non-traditional function: 29 C.F.R. § 775.3(b)(3). Third, every federal circuit court of appeals to address the issue prior to *Garcia* held that mass transit operations were nontraditional governmental functions obligated to comply with the FLSA. *Kramer*, 677 F.2d at 310; *Dove*, 701 F.2d at 53; *Alewine*, 699 F.2d at 1069. Thus, even applying the *Chevron* doctrine, SAMTA's employees are still entitled to relief because they were protected by the FLSA under the law prior to *Garcia*.

The decision in *Dove*, slip op. at 8-9 (R. 102-03), finding that mass transit under pre-*Garcia* law was *not* a "traditional governmental function," illustrates the illogical consequences of the district court's approach here. The district court in SAMTA and *Dove* cannot both be correct concerning the application of the "traditional governmental functions" test to mass transit. Would the Supreme Court be expected to resolve a split in the circuits by applying the "unworkable" doctrine which it has already rejected? The only logical and workable approach to determining pre-*Garcia* law is to use the objective evidence of pre-*Garcia* law, the text of the FLSA and its attendant DOL regulations, neither of which were ever held inapplicable to mass transit by a final court decision or act of Congress. On the contrary, their enforceability was clearly upheld by the Court in *Garcia* and as applied to mass transit by Congress in enacting the 1985 FLSA Amendments, §§ 2(c), 7.

In enacting the 1985 FLSA Amendments, Congress considered various legislative proposals for relieving em-

ployers of liability for FLSA violations occurring both before and after the *Garcia* decision. *See supra* discussion Section IC. Congress chose to use the DOL's existing regulations as the only objective basis for determining whether a particular governmental activity was to be statutorily exempt from liability prior to April 15, 1986. 1985 FLSA Amendments, §§ 2(c), 7.

> The crucial point . . . is that *Congress defined the scope of the exception to the liability—limiting FLSA Amendments not by using the "traditional function" rule from National League, but by using the specific list of non-traditional functions established by the special enforcement policy.* Therefore, determining whether an action against a state or locality for overtime pay under the FLSA is precluded by the FLSA Amendments does not require analysis of the particular function under *National League.* The applicable rule is that only a state or local government employee who worked in one of the areas designated as nontraditional may bring an action for overtime violations which occurred before April 15, 1986.

Wong v. New York, 641 F.Supp. at 590 (emphasis added). Since mass transit was clearly designated "nontraditional" under DOL's 1979 regulations, the 1985 FLSA Amendments preserved the claims of SAMTA's employees and required that they be resolved on the basis of the applicable federal statutory scheme.

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* * * *

V. SAMTA IS STATUTORILY LIABLE FOR ITS OVERTIME VIOLATIONS UNDER PRE-*GARCIA* LAW.

The district court and SAMTA's contentions that plaintiffs have not "vigorously urged rejection of Judge Shannon's consistent position" that they performed a traditional government function and that there is "no authority" mandating rejection (R. 8; SAMTA Br. at 47, 48) is directly contradicted by the record. *Garcia* vigorously appealed both of Judge Shannon's rulings to the Supreme Court and the resulting Supreme Court rulings vacating and reversing his rulings are binding authority for their rejection. *Donovan v. SAMTA*, 457 U.S. 1102 (1982); *Garcia*, 469 U.S. 528.

Nevertheless, in the event this Court decides to rule on the basis of pre-*Garcia* law, it must reject SAMTA's attempt to have this Court apply the district court's vacated and reversed rulings. No principle of jurisprudence could possibly support the bizarre result that a rationale and ruling reversed by the Supreme Court could be resurrected and enforced by the district court on remand. Indeed, the very attempt to apply the rule in *National League* would require this Court to reverse the *Garcia* rejection of the rule "as unsound in principle and unworkable in practice." 469 U.S. at 546. Instead, this Court should adopt the only objective evidence of pre-*Garcia* law, the text of the FLSA and its attendant regulations, neither of which were ever held inapplicable to mass transit by a final court decision or Act of Congress. Congress approved such an approach in enacting the 1985 FLSA Amendments when it preserved the liability of mass transit in accordance with the pre-*Garcia* regulations. *Wong*, 641 F.Supp. at 590.

* * * *